No.....

In The

United States Circuit Court of Appeals

For The Sixth Circuit

Giles Kavanagh,
Collector of Internal Revenue,
Defendant and Appellant.

v.

J. H. Noble,
Plaintiff and Appellee,

Appeal From the District Court of the United States for the Eastern District of Michigan, Southern Division.

TRANSCRIPT OF RECORD

John C. Lehr,
United States Attorney.

Morris Zwerdling,
Assistant United States Attorney,
Federal Building,
Detroit, Michigan,
Counsel for Appellant.

Eugene M. Baynes and
W. H. Harris,
201 Harris Building,
Fort Valley, Georgia.

Julius L. Berns,
984 Penobscot Building,
Detroit, Michigan,
Counsel for Appellee.

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UNITED STATES OF AMERICA

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

J. H. NOBLE,
Plaintiff,
vs.
GILES KAVANAGH, Collector of Internal Revenue,
Defendant.

Civil No. 5855

STATEMENT OF POINTS TO BE RELIED UPON

(Filed Aug. 13, 1946)

Giles Kavanagh, defendant and appellant herein, hereby states points upon which he intends to rely in this Court in this case as follows:

1. The Court erred in overruling defendant's motion for summary judgment and in granting plaintiff's motion for summary judgment.

2. The Court erred in finding and concluding that plaintiff's claim for refund of the disputed portion of the deficiency assessment paid to defendant on July 21, 1937, on account of plaintiff's 1935 income tax was timely filed on January 28, 1941, under the four year period of limitation running from the date of payment thereof which is prescribed by Section 3313 of the Internal Revenue Code (26 U.S.C. 1940 ed., Sec. 3313).

3. The Court erred in refusing to find and conclude that plaintiff's said claim for refund was not timely filed under the two year period of limitation running from the payment thereof which is prescribed by Section 322(b)(1) of the Internal Revenue Code (26 U.S.C. 1940 ed., Sec. 322).

4. The Court erred in rendering judgment against defendant and in favor of plaintiff in any amount.

JOHN LEHR,
United States Attorney,

By MORRIS ZWERDLING,
Assistant United States Attorney,
Attorneys for Defendant.

Dated: August 12, 1946.

PLAINTIFF'S THIRD AMENDED COMPLAINT

(Filed February 6, 1945)

Now comes J. H. Noble, plaintiff herein and with the leave of the Court first had and obtained files this his Third amended complaint so that for the convenience of Court and counsel his cause of action as developed in prior pleadings may be incorporated in one pleading, and alleges:

1.

Plaintiff is a citizen of the United States residing in the County of Palm Beach, State of Florida, but was a resident of Wayne County, Michigan during 1935, 1936 and 1937.

2.

Defendant is a resident of Wayne County, Michigan and is and was at all times hereinafter named, Collector of Internal Revenue for the District of Michigan and was the Collector to whom the monies now sought to be recovered were paid.

3.

This is a suit arising under the laws of the United States providing for internal revenue and is a suit for the recovery of $21,105.90 erroneously and illegally collected from plaintiff as for internal revenue taxes.

4.

In March, 1936, the plaintiff, J. H. Noble, and his wife, Ethel G. Noble, filed with the defendant Collector of Internal Revenue at Detroit, Michigan, their joint individual income tax return on Treasury Form 1040 for the calendar year 1935, reporting total tax due of $8,017.01 which was duly paid by the plaintiff to said Collector in quarterly installments during the year 1936.

5.

On said return the losses and gains from sales of capital assets were reported together, the losses of the wife being deducted from the gains of the husband, resulting in a net loss in excess of $2,000.00, which amount (the allowable limit of loss) was deducted on the return.

6.

Thereafter, the said J. H. Noble and Ethel G. Noble were notified by the Internal Revenue Agent in Detroit, Michigan, of a proposed tax deficiency against them, pursuant to which notice a conference was held on June 7, 1937, in the office of the Internal Revenue Agent in Charge in Detroit, Michigan.

7.

At said conference on June 7, 1937, plaintiff agreed upon a proposed deficiency in income tax for the year 1935 with interest thereon aggregating $421.80 for which amount plaintiff gave his individual check on that date payable to the Collector of Internal Revenue and waiver agreement Form 870 that such amount was the deficiency was executed by plaintiff and his wife.

8.

Said Waiver Form 870 is not a "closing agreement", nor does it preclude the assertion of a further deficiency or the assertion of a claim for refund.

9.

Thereafter, under date of June 11, 1937, the Internal Revenue Agent in Charge at Detroit wrote the plaintiff stating that the proposed deficiency instead of being $421.80, as advised at the conference on June 7, 1937, should be $19,973.93 (besides interest) giving as his reason that under Regulation 86, Article 117-5, in a joint

return the losses from sales of capital assets of one spouse could not be set off against the gains of the other spouse from such sales. A true copy of that letter is attached hereto as Exhibit "A".

10.

Thereupon, after further conference and protest, on July 14, 1937 plaintiff's prior check for $421.80 was returned to him and he gave his individual check for $21,527.70 payable to the defendant Collector. Said latter check of $21,527.70 included the deficiency and interest thereon amounting to $421.80 determined and paid at the June 7, 1937 conference and also included the $21,105.90 collected and assessed by reason of the ruling of the Commissioner that in the sales of capital assets the losses of the plaintiff's wife could not be set off against his gains.

11.

On December 9, 1940 the United States Supreme Court in the case of *Helvering v. Janney, et al.* (311 U.S. 189) held that in a joint return the losses of one spouse from sales of capital assets should be set off against the gains of the other spouse from like sales, thus holding in effect that the assessment and collection of said $21,106.90 from plaintiff had been erroneously and illegally made.

12.

On January 28, 1941 plaintiff and his wife filed in the office of the defendant Collector on Treasury Department Form 343 a claim for refund of the erroneous and illegal collection aforesaid with interest from July 14, 1937.

13.

It was stated in said claim for refund that the time within which the same might be legally filed under Section 619(C) of the Revenue Act of 1928 would expire on July 14, 1941, and the ground of the claim stated therein was:

"The Internal Revenue department refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband and wife, and made an extra assessment on July 11, 1937 in the principal sum of $19,973.93 and interest in the sum of $1,553.77 which amounts were paid under protest on July 14, 1937. We claim this to be an illegal assessment and collection, and that it should be refunded to the claimants.

United States Code Annotated, Title 26, Section 3313."

14.

On July 12, 1941, plaintiff individually filed with the defendant Collector on Form 843 a claim for refund of the amount illegally and errnoeusly assessed and collected from him and upon the same ground.

15.

On August 19, 1941, the Commissioner of Internal Revenue notified the plaintiff by registered mail of the disallowance and rejection of the claim of January 28, 1941, solely on the ground that the said claim had not been filed within the period of limitation prescribed by law.

16.

The claims for refund were filed within four years after the payment of the tax, and this action was begun within two years after the disallowance of the claim, having been begun on July 10, 1943.

17.

The action of the Commissioner in disallowing the said claim was erroneous and illegal in that the Commissioner applied, in determining the period of limitatin allowed for the filing of a claim for taxes erroneously and illegally assessed and collected, Section 322(b) of the Revenue Act of 1934, whereas the provision of law properly applicable

was and is Section 3228(a) Revised Statutes as amended by Section 1316 Act of November 23, 1921, Section 1012 of Revenue Act of 1924, Section 1112 Revenue Act of 1926, Section 619(e) Revenue Act of 1928 and Section 1106(a) Revenue Act of 1932; said section as so amended being Internal Revenue Code Section 3313.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of $21,105.90 with interest thereon from July 14, 1937, as provided by law.

E. M. Baynas,
W. H. Harris,
Julius L. Berns,
Plaintiff's Attorneys.

VERIFICATION

State of Florida,
County of Palm Beach.

Personally appeared J. H. Noble, who being duly sworn, herein on oath, says that he is the plaintiff named in the foregoing proceeding and that the allegations and statements therein are true to the best of his knowledge and belief.

J. H. Noble.

Subscribed and sworn to before me
this 2nd day of January, 1945.

Minnie Keasley,
Notary Public, State of Florida at Large.
My commission expires December 18, 1948.
(Seal)

EXHIBIT "A"

TREASURY DEPARTMENT
Internal Revenue Service
Detroit, Michigan
June 11, 1937

555 Federal Building
IT:S—6/24/37

Mr. J. H. Noble
18055 Hamilton Road
Detroit, Michigan

Sir:

In conference on June 7, 1937, you were advised that an additional tax of $421.80 was due on your 1935 income tax return.

In completing the audit of the return, it was found that you had failed to comply with the provisions of Article 117-5, Regulations 86, Article 117-5, reads as follows:

> "In the application of Section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under Section 117(d) on the allowance of losses of one spouse from sale or exchange of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets."

When this provision is applied to the sales of stocks, Mrs. Noble has a net loss of $49,862.56, of which $2,000.00 is deductible, and you have a net gain of $45,049.45.

After allowing you an earned income credit of $853.59 and Mrs. Noble $300.00 an additional tax of $19,273.93 results.

The check and agreement submitted for 1935 are being held in this office, subject to instructions from you. Should

you desire to protest the adjustment, please so advise this office, and the check and signed agreement will be mailed to you. Should you desire to accept the new computation, the agreement will be mailed to you. Should you desire to accept the new computation, the agreement previously signed will be sent forward with the report, the check submitted will be deposited with the Collector of Internal Revenue, and payment of the balance due may be made when assessed.

Please advise what action you contemplate at the earliest date possible. In your reply, please refer to the symbols IT:S—6/24/37.

GEORGE E. NEAL,
Internal Revenue Agent in Charge.
By W. A. FINNEY.

ANSWER TO THIRD AMENDED COMPLAINT

(Filed February 21, 1945)

The defendant, Giles Kavanagh, Collector of Internal Revenue for the Collection District of Michigan, comes now by his attorney, John C. Lehr, United States Attorney for the Eastern District of Michigan, and for his answer to the third amended complaint, avers as follows:

FIRST DEFENSE

The third amended complaint fails to state facts showing a claim upon which relief can be granted as against the defendant Collector.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of this litigation because plaintiff has not met the conditions precedent upon which the United States has consented that suits may be maintained against its collectors of Internal Revenue of this character, since plaintiff failed to file claim for refund of the disputed exaction of income tax within the time required by law.

THIRD DEFENSE

For further answer to the third amended complaint defendant avers as follows:

I

Admits the averments contained in paragraphs 1, 2, 5, 6, 8, 9 and 15 of the third amended complaint.

II

Denies the averments contained in paragraph 3 of the amended complaint except admits that this is a suit arising under the laws of the United States providing for

internal revenue and is an action for the recovery of $21,105.90 alleged to have been erroneously and illegally overpaid by plaintiff as internal revenue taxes.

III

Admits the averments contained in paragraph 4 of the third amended complaint with the additional averment that plaintiff and his wife filed their joint individual tax return for the calendar year 1935 on March 16, 1936, and the last quarterly payment in the sum of $2,004.25 of the tax therein reported to be due was made by plaintiff on December 19, 1936.

IV

Admits the averments contained in paragraph 7 of the third amended complaint but avers that said check for $421.80 and Waiver Agreement Form 870 referred to in said paragraph were never delivered to or received by this defendant.

V

Admits, upon the basis of information and belief, the averments contained in paragraph 10 of the third amended complaint except this defendant avers that on July 21, 1937, he received from the Office of Internal Revenue Agent in Charge at Detroit, plaintiff's check made payable to the order of this defendant for the sum of $21,527.70 and a written "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" in the principal sum of $19,973.93 for the year 1935, signed by the plaintiff J. H. Noble, and his wife Ethel G. Noble, together with a report from the Internal Revenue Agent in Charge addressed to the Commissioner of Internal Revenue at Washington, D. C., showing the basis of said deficiency assessment and that plaintiff had waived his right to petition the United States Board of Tax Appeals (now the United States Tax Court) for redetermination of said deficiency and had consented to its immediate assessment

and collection without prejudice to plaintiff's right to file claim for refund after payment thereof.

A true copy of the above-mentioned "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" for the year 1935 is attached hereto, marked Exhibit A and incorporated by reference as a part of this answer.

VI

Denies the averments contained in paragraph 11 of the third amended complaint except admits that the Supreme Court of the United States rendered its decision in the case of *Helvering* v. *Janney* (311 U.S. 189) on December 9, 1940, and avers that the Supreme Court's decision speaks for itself.

VII

Denies the averments contained in paragraph 12 of the third amended complaint except admits that on January 28, 1941, plaintiff and his wife filed claim for refund of 1935 income tax paid in the sum of $21,105.90, plus interest after its payment.

VIII

Denies averments contained in paragraph 13 of the third amended complaint except admits that the statement of grounds for recovery asserted in the claim for refund of $21,105.90 filed by plaintiff and his wife on January 28, 1941, as set forth in said claim for refund is correctly quoted and copied in said paragraph 13 of the amended complaint.

IX

Admits the averments in paragraph 14 of the third amended complaint that plaintiff individually filed with defendant a claim for refund of 1935 income tax paid in the sum of $21,527.70, but denies all other averments in said paragraph.

X

Admits the filing of plaintiff's claim for refund within four years after payment of disputed tax and the commencement of this action within two years after the disallowance of the claim, as averred in paragraph 16 of the third amended complaint, but denies that said claim for refund was timely filed.

XI

Denies the averments contained in paragraph 17 of the third amended complaint and avers in this connection that plaintiff was required by the provisions of Section 322(a) and (b)(1) and Sections 3770(a)(1) and 3772 (a)(1) of the Internal Revenue Code (26 U.S.C. 1940 ed., Sections 322, 3770, and 3772), to file his claim for the disputed collection for his 1935 income tax within three years after the date of the filing of plaintiff's 1935 income tax return (March 16, 1936) or within two years after the date on which the defendant's Collector received payment of the disputed deficiency assessment of plaintiff's 1935 income tax (July 21, 1937), whichever period is later; and that when plaintiff failed to file its claim for refund of said disputed deficiency until January 28, 1941, and after the expiration of both of the alternative limitation periods therefor as above provided, the Commissioner of Internal Revenue was without jurisdiction or authority to allow a refund to plaintiff in any amount with respect to income tax paid for said year 1935.

XII

Denies each and every averment in the third amended complaint not herein before specifically admitted, denied or explained, and denies that he is indebted to plaintiff or that plaintiff is entitled to recover any sum from this defendant in this action.

And now having fully answered this defendant demands judgment dismissing the third amended complaint and for his costs and lawful disbursements herein.

JOHN C. LEHR,
United States Attorney.

C. T. DINU,
Assistant U. S. Attorney.

EXHIBIT A

Form 870

TREASURY DEPARTMENT
Internal Revenue Service
Revised Oct., 1935.

Received
Jun 2 1937

Waiver of Restrictions on Assessment and Collection of Deficiency in Tax

Pursuant to the provisions of Section 272(d) of the Revenue Act of 1934, and/or the corresponding provisions of prior Revenue Acts, the restrictions provided in Section 272(a) of the Revenue Act of 1934, and/or the corresponding provisions of prior Revenue Acts, as amended, are hereby waived and consent is given to the assessment and collection of the following deficiency or deficiencies in income tax and/or excess-profits tax:

taxable year ended 1935 income tax in the sum of $19,973.93

taxable year ended ..... income tax in the sum of $.....

taxable year ended ..... income tax in the sum of $.....

taxable year ended .....
excess-profits tax in the sum of $.....

taxable year ended .....
excess-profits tax in the sum of $.....

amounting to the total sum of.....$.....
together with interest thereon as provided by law.

(Sgd.) J: H. Noble,
Taxpayer,

(Sgd.) Ethel G. Noble,
Taxpayer,
18055 Hamilton Rd.
Address.
By Detroit, Mich.

Date.....

NOTE.—The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 606 of the Revenue Act of 1928 and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

AGREED STATEMENT OF FACTS

(Filed May 23, 1945)

It is hereby stipulated and agreed by and between the parties by their respective attorneys of record that upon any hearing of this cause and solely for the purpose of such hearing the following facts shall be taken to be true. This stipulation is without prejudice to the right of either party to offer evidence at the hearing to establish other facts not inconsistent with those herein stipulated.

1.

Plaintiff is a citizen of the United States and during 1935, 1936 and 1937 was a resident of Wayne County, Michigan.

2.

Defendant is a resident of Wayne County, Michigan, and is and was at all times hereinafter named Collector of Internal Revenue for the District of Michigan and is the Collector to whom plaintiff paid the money now sought to be recovered.

3.

This is a suit for the recovery of the principal sum of $21,105.90 alleged to have been erroneously and illegally collected from the plaintiff as for internal revenue taxes.

4.

On March 16, 1936, the plaintiff filed with the defendant Collector of Internal Revenue at Detroit, Michigan, the joint individual income tax return of himself and wife on Treasury Form 1040 for the calendar year 1935, reporting total tax due of $8,017.01 which was paid by the plaintiff to said Collector quarterly, the last quarterly payment having been made on December 19, 1936.

5.

On said return the losses and gains from sales of capital assets by plaintiff and by his wife were reported together, the losses of the wife being deducted from the gains of the husband, resulting in a net loss in excess of $2,000.00, which amount (the allowable limit of loss) was deducted on the return.

6.

Plaintiff was called into a conference in the office of the Internal Revenue Agent in Charge at Detroit on June 7, 1937, at which time there was determined an additional income tax for the year 1935 with interest thereon aggregating $421.80 for which amount plaintiff gave to the Internal Revenue Agent in Charge his check on that date, payable to the Collector of Internal Revenue. That check unused was later returned to plaintiff without having been delivered to the defendant Collector.

7.

On said date, June 7, 1937, plaintiff and his wife executed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" on Treasury Form 870. That consent for the immediate assessment of a deficiency of $421.80 was never used by the Bureau of Internal Revenue for reasons hereinafter set forth.

8.

(a) By letter dated June 11, 1937, George E. Neal, Internal Revenue Agent in Charge at Detroit, notified plaintiff as follows:

> "In conference on June 7, 1937, you were advised that an additional tax of $421.80 was due on your 1935 income tax return.
>
> In completing the audit of the return, it was found that you had failed to comply with the pro-

visions of Article 117-5, Regulations 86. Article 117-5 reads as follows:

> 'In the application of Section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under Section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.'

When this provision is applied to the sales of stocks, Mrs. Noble has a net loss of $49,862.56, of which $2,000.00 is deductible, and you have a net gain of $45,049.45.

After allowing you an earned income credit of $853.59 and Mrs. Noble $300.00, an additional tax of $19,973.93 results.

The check and agreement submitted for 1935 are being held in this office, subject to instructions from you. Should you desire to protest the adjustment, please so advise this office, and the check and signed agreement will be mailed to you. Should you desire to accept the new computations, * * * the check submitted will be deposited with the Collector of Internal Revenue, and payment of the balance due may be made when assessed:

Please advise what action you contemplate at the earliest date possible. * * *''

(b) A detailed statement of recomputation which was prepared in the office of the Internal Revenue Agent in Charge more fully covering the proposed deficiency is as follows:

J. H. and Ethel G. Noble

SUMMARY

Year, 1935; Increase in Income, $46,455.46; Additional Tax, $19,973.93.

STATEMENT OF TOTAL TAX LIABILITY

Tax Previously Assessed	Deficiency	Correct Tax Liability
$8,017.01	$19,973.93	$27,990.94

SCHEDULE 1

BLOCK ADJUSTMENTS

	Return	*Additions to Income*	*Corrected*
2. Business	($1,542.98)	$ 1,069.00	($ 473.98)
3. Interest	875.26		875.26
8. Capital Gain	(2,000.00)	45,409.45	43,049.45
10. Dividends	65,361.14	126.08	65,487.22
12 Total Income	$62,693.42		$108,937.95
14. Taxes	2,873.66	210.93	2,662.73
16. Bad Debts	5,000.00		5,000.00
17. Contributions	100.00		100.00
18. Other Deductions	763.05		763.05
19. Total Deductions	$8,736.71		$8,525.78
TOTAL INCOME	$53,956.71	$46,455.46	$100,412.17

SCHEDULE 1-A

EXPLANATIONS

Item 2. Mr. Noble's business is trading in stocks and bonds. A deduction of $1,542.98 expense consisting of the following items was claimed.

(a) Bloomfield Hills Club dues	$ 180.00
(b) Automobile depreciation	760.00
Miscellaneous	42.00
(c) Depreciation on office furniture	129.00
Telephone	45.70
(d) Traveling expense	386.28
Total	$1,542.98

(a) Club dues have been disallowed as a personal expense. I. T. 1844, C. B. II—2, page 104 reads in part as follows:

"A taxpayer was employed in a business where the greater part of his income was dependent upon the amount of business secured and he, therefore, joined a certain athletic club for the purpose of meeting its members in order to obtain business from them. The dues are not deductible."

(b) Depreciation of $760.00 on a Cadillac V-16 was deducted. Since it has not been shown that a car was necessary to the operation of a stock trading account the depreciation claimed has been disallowed.

(c) Depreciation of $129.00 on furniture, rugs, etc. was claimed. This amount is at 3% on a cost of $4,300 and is on furniture in home, on the theory that his home was used for an office. This amount has been eliminated as no regular office is maintained in home.

(d) Mr. Noble makes various trips to New York to investigate, and secure first hand information on stock in which he is trading. Traveling expense has been accepted as reported.

Item 8. For computation of loss on stock transactions see Schedule attached as Exhibit A.

Item 10. Dividends reported consist of the following Items:

Paine Webber & Co.	
John H. Noble (joint acct.)	$13,175.00
John H. Noble #2%	11,250.00
Ethel G. Noble	2,160.00
Ethel G. Nobel (direct)	24,275.00
General Motors	380.00
Sterling Products	600.00
S. O. of Indiana	135.00
Whitehouse & Co.	
Kennicott	100.00
John H. Noble (direct)	
General Motors 5% pfd	320.00
General Motors Com	11,808.75
S. O. of Indiana	600.00
Dupont	224.35
Kennecott	135.00
Total	$65,163.10

Both Mr. and Mrs. Nobel received $325.00 dividends from Kennecott Copper Company and each reported $135.00 as taxable. This amount has been accepted subject to approval by the Bureau.

A dividend of 2-13/55 shares of General Motors preferred stock was received as a dividend on Dupont stock. Market value, $126.08.

Item 4. Taxes deducted have been verified and found correctly reported with the exception of $210.93. Special assessment taxes which have been eliminated.

Item 16. In 1935 Mr. Noble entered into a composition agreement whereby he accepted $22.25 for a loan of $5,000 to Harry S. Covington. Mr. Noble states he does not remember the exact date of the loan, but it was some time before the bank crash. For full details see statements attached as Exhibits B and C.

Mr. Noble deducted the full $5,000 in 1935 and reported the receipt of $22.25 in 1936. Adjustment is not warranted.

Item 18. An assessment of $763.05 was paid on Detroit Guardian Group bank stock 3/26/35. The stock became worthless in 1933.

SCHEDULE 2

Computation of Earned Income Credit

	Husband	*Wife*
Earned Income:		
Income from business (not in excess of 20 percent of $45,049.45)	$9,009.89	
Earned Income Deductions:		
Expense (Item 1)	473.98	
Earned Net Income	8,535.91	
Entire Net Income	68,174.67	$32,237.50
Earned Income Credit:		
(10 percent of $8,535.91)	853.59	
(10 percent of $3,000.00)		300.00
Total Earned Income Credit (husband and wife)		$1,153.59

SCHEDULE 3

Year ended 12/31/35

COMPUTATION OF TAX

Net income (from Schedule 1)		$100,412.17
Less: Personal exemption	$2,500.00	
Credit for dependents	400.00	2,900.00
Income subject to surtax		$97,512.17
Less: Dividends	$65,487.22	
Earned income credit	1,153.59	66,640.81
Balance subject to normal tax		$30,871.36
Normal tax at 4% on $30,871.36	$1,234.85	
Surtax on $97,512.17	26,756.09	
Total tax assessable		27,990.94
Tax previously assessed		8,017.01
Tax to be assessed		$19,973.93

9.

After protest and further conference, and on July 14, 1937, plaintiff's check for $421.80 (which had never been delivered to the defendant Collector) was returned to plaintiff; plaintiff gave the Internal Revenue Agent in Charge a new check for $21,527.70 payable to the defendant Collector covering the then proposed deficiency assessment of tax of $19,973.93 plus deficiency interest computed thereon of $1,553.77; and the check for $21,527.70 was received on July 21, 1937, by the defendant Collector, who remitted same to the Treasury of the United States as a collection of internal revenue.

10.

On June 14, 1937 plaintiff and his wife executed and delivered to the Internal Revenue Agent in Charge at

Detroit another Waiver Agreement Form 870 under which they waived certain statutory restrictions in their favor and consented to the immediate assessment and collection of a deficiency against them of 1935 income tax in the principal sum of $19,973.93, and the Commissioner of Internal Revenue thereafter duly assessed a deficiency against them of tax of $19,973.93 plus deficiency interest thereon of $1,553.77, totaling the sum of $21,527.70 above mentioned.

11.

The said waiver agreement Form 870 contains a footnote printed on same reading in part as follows:

> "The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 606 of the Revenue Act of 1928 and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.
>
> "If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, . . ."

12.

On January 28, 1941, plaintiff and his wife filed in the office of the defendant Collector on Treasury Form 843 a claim for refund of income tax together with deficiency interest paid thereon for the year 1935 in the total sum of $21,105.90, plus interest after its payment. That claim for refund was on the ground stated therein as follows:

> The Internal Revenue Department refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband

and wife, and made an extra assessment on July 11, 1937 in the principal sum of $19,973.93 and interest in the sum of $1,553.77 which amounts were paid under protest on July 14, 1937. We claim this to be an illegal assessment and collection, and that it should be refunded to the claimants. United States Code Annotated, Title 26, Section 3313.

On August 19, 1941, the Commissioner of Internal Revenue formally notified plaintiff and his wife by registered mail of the disallowance and rejection of said claim for refund. In that letter the Commissioner referred to an earlier communication which had been sent by the Bureau of Internal Revenue to plaintiff and his wife on April 25, 1941, in which the grounds for his decision had been stated by a subordinate of the Commissioner as follows:

> Claim filed January 28, 1941 for the refund of $19,973.93 additional tax and $1,553.77 interest paid July 21, 1937 on 1935 income tax return is rejected in accordance with Sec. 322(b)(1) of the Revenue Act of 1934, which reads in part as follows:
>
> "Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later."
>
> Section 3313 of the Internal Revenue Code, referred to in the claim specifically excludes income taxes from the taxes for which a claim may be filed within four years after payment.

14.

Meanwhile on July 12, 1941 plaintiff transmitted and delivered to the defendant Collector his individual claim for refund of $21,527.70 covering the above mentioned

payment of 1935 income tax and interest paid thereon on July 16, 1937. That claim was executed and verified under oath by the plaintiff individually on July 3, 1941, and was on the same grounds as the claim filed by the plaintiff and his wife on January 28, 1941 and set forth in paragraph 12 hereof.

15.

Said individual claim executed July 3, 1941 was returned by letter dated August 7, 1941 from the defendant Collector to the plaintiff with a request that the plaintiff's wife join in the execution of the claim, which request was refused, and the claim was returned to the defendant Collector on September 23, 1941; and on October 3, 1941 the defendant again returned the claim to the plaintiff.

16.

Plaintiff's said claim dated July 3, 1941, and delivered to the defendant Collector on July 12, 1941 for transmission to the Commissioner of Internal Revenue has not been acted on by the Commissioner.

17.

The parties stipulate expressly without prejudice to their respective rights herein that for the purpose of a breakdown of the deficiency collection of 1935 income tax and deficiency interest totalling $21,527.70 hereinbefore mentioned, (a) $21,105.90 thereof may be allocated to the Commissioner's adjustment increasing the reported income under the joint return by $45,049.45 under his ruling that losses sustained by plaintiff's wife from the sale of her capital assets could not be offset against gains derived by the plaintiff from the sale of his capital assets during the taxable year; and (b) that the balance of said payment consisting of tax deficiency and interest thereon paid to the extent of $421.80 may be allocated to certain other adjustments made by the Commissioner to the returned income for the year 1935, the propriety of which is not in question in this proceeding.

18.

Plaintiff commenced this action on July 10, 1943.

Executed this 19th day of May, 1945.

E. M. BAYNES,
W. M. HARRIS,
JULIUS BERNS,
Attorneys for Plaintiff.

JOHN C. LEHR,
United States Attorney,

MORRIS ZWERDLING,
Assistant United States Attorney,

FRANK J. READY,
Special Ass't to the Attorney General,
Attorneys for the Defendant.

DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AGAINST PLAINTIFF

(Filed January 15, 1946)

Comes the defendant by his attorneys, John C. Lehr, United States Attorney for the Eastern District of Michigan, and Morris Zwerdling, Assistant United States Attorney for said district, and moves the Court to dismiss this action for lack of jurisdiction to grant plaintiff any relief under the third amended complaint and by reason of plaintiff's claim being barred by the statute of limitations, for the following reasons:

(1) Because plaintiff failed to file claim for refund of the disputed portion of the deficiency payment of his 1935 income tax now in controversy either before the expiration of three years after the time of the filing of plaintiff's 1935 income tax return (March 16, 1936) or before the expiration of two years after the time the disputed

tax was paid (July 21, 1937), whichever was later, as prescribed by Sections 322(a)(1) and (b)(1), 3770(a)(1) and 3772(a)(1) of the Internal Revenue Code (26 U.S.C. 1940 ed., Sections 322, 3770 and 3772);

(2) Because the four-year period of limitation prescribed by Section 3313, Internal Revenue Code (26 U.S.C. 1940 ed., Section 3313) for the filing of claims for refund of certain internal revenue tax payments does not apply to the disputed portion of the deficiency payment on account of plaintiff's 1935 income tax which is sought to be recovered herein; and

(3) Because there are no material facts under the pleadings and agreed statement herein which are now in dispute between the parties.

Memorandum of authorities in support of this motion and in opposition to plaintiff's motion for judgment will be served and filed at least ten days prior to the hearing upon the conflicting motions.

JOHN C. LEHR,
United States Attorney,

By MORRIS ZWERDLING,
Assistant United States Attorney.

Dated: January 15, 1946.

AMENDED MOTION FOR SUMMARY JUDGMENT

(Filed February 24, 1946)

Now comes the Plaintiff and Amends his Motion for Summary Judgment upon the Pleadings heretofore filed and herein sets forth the grounds and reasons therefor:

1.

The sum of $21,105.90 paid by the Plaintiff to the Defendant on July 14, 1937, was assessed by the Commis-

sioner and collected by the Defendant under the ruling of the Commissioner that on the joint return for 1935 filed by Plaintiff and his wife, the losses of his wife from sales of capital assets could not be offset against Plaintiff's gains from such sales.

2.

On December 9, 1940, the United States Spreme Court in *Helvering v. Janney, et al.*, 311 U.S. 189, held that such ruling of the Commissioner was erroneous and illegal so that the said payment was erroneously and illegelly assessed and collected.

3.

The original claim for refund was filed January 29, 1941, and a subsequent claim for refund was filed July 12, 1941, so that claim was filed more than two years after the illegal and erroneous assessment was made, but within less than four years after such payment.

4.

The only point at issue is whether the limitation period for the filing of a claim for refund provided in Internal Revenue Code Section 3313 or that provided in Internal Revenue Code Section 322 controls in this case.

5.

In *United States v. The Lederer Terminal Warehouse Company*, 139 F(2d) 679, the Circuit Court of Appeals of this Circuit held in a like case that Section 3313 controls and that a claim filed within four years after the payment of the tax was timely.

6.

Because there are no material facts under the Pleadings and the Agreed Statement of Facts herein, which are now in dispute between the parties.

Wherefore, Plaintiff prays Summary Judgment against the Defendant for the sum of $21,105.90, with interest thereon from July 14, 1937, as privoded by law.

Dated: February 19, 1946.

E. M. Baynes,
W. H. Harris,
Julius L. Berns,

By: Julius L. Berns,
Attorneys for Plaintiff,
984 Penobscot Building,
Detroit 26, Michigan.

MEMORANDUM REGARDING PROCEEDINGS AT HEARING

(Filed April 15, 1946)

At the hearing of this case on April 15, 1946, before His Honor, District Judge Arthur F. Lederle, in open court, the following proceedings were had:

Mr. Frank J. Ready, of counsel for the defendant, moved the Court for leave to enlarge the record (consisting of the pleadings, the stipulation of facts, and conflicting motions of the parties for summary judgment) by reading into the record the following extract from a certain official publication issued by the Commissioner of Internal Revenue, March 11, 1919, which was printed by the Government Printing Office, Washington, D. C., in 1919, in part, as follows:

Cover Page of Publication:

"MANUAL OF
REVENUE ACCOUNTING DIVISION
FOR USE IN
OFFICES OF COLLECTORS
OF INTERNAL REVENUE

(PRELIMINARY EDITION)
(Seal of Office of Commissioner of Internal Revenue)
WASHINGTON
GOVERNMENT PRINTING OFFICE
1919"

The Commissioner's letter appearing on the inside of the cover page thereof reading as follows:

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, March 11, 1919.

To all Collectors of Internal Revenue:

This preliminary issue of a manual on internal revenue accounting is furnished you at this time for the assistance and guidance of your employees in opening the revenue accounts of your office.

In the very near future it is planned to assemble and consolidate all previously issued bulletins and other regulations governing the keeping of your accounts, including instructions for sorting and listing returns, into a comprehensive illustrated manual which will fully explain the procedure to be followed in accounting for administrative appropriations as well as for revenues.

Sincerely yours,
DANIEL C. ROPER, *Commissioner.*"

Paragraphs 45, 51 and 52 thereof reading as follows:

Page 7:

"CORRECTIONS IN RETURNS.

"45. Wherever an error is discovered in a return the deputy in charge will prepare a correction voucher in the form of a letter to the taxpayer setting forth the nature of the error and stating the amount of tax originally shown, the amount of increase or decrease occasioned by the correction, and the amount which should have been shown. These letters must invariably show the name and address of the taxpayer, serial number of the return, and the kind of tax. One copy of the letter will be mailed to the taxpayer, one copy will be retained and attached to the return, one copy will be kept in the index files and one copy will be retained by the tax division. Such corrections will be recorded in the tax division daily journal of miscellaneous transactions, in the manner illustrated by Exhibits 12 and 13. The amount by which the total of each block of returns is increased or decreased will also be noted on the outside of the jacket, and the new balance (as corrected) will be brought down."

* * *

Page 8:

"ABATEMENT CLAIMS ALLOWED.

"51. An abatement claim allowed by order of the Commissioner is authority for making a reduction in the tax list and must be posted to the credit of the taxpayer's account. In the 'remarks' column of the list reference should be made to the abatement order number and date. For method of reporting such abatement orders see Exhibit 5.

"REFUND VOUCHERS.

"52. In case the taxpayer had paid the tax subsequent to the date of filing the abatement claim and prior to the receipt of the abatement order from the Commissioner the posting of the abatement order to his account as stated in the preceding paragraph will result in a credit balance. This constitutes an excess abatement and when proper authority has been secured from the Commissioner a refund will be made to the taxpayer. Similarly, refunds will be made for excess, erroneous or duplicate payments. Refund vouchers therefor will be prepared by the proper tax division and certified to the cashier for payment from the collector's disbursing funds for such purposes. The amounts of such refund vouchers will be posted to the tax list as a debit to the taxpayer. A daily report will be made of such refund vouchers in the manner illustrated by Exhibits 5, 6, and 12."

Counsel for the government explained to the Court that officers of the Bureau of Internal Revenue had called the above Commissioner's Manual of Revenue Accounting to his attention on the eve of his departure from Washington for this hearing and had requested that the above-quoted paragraphs thereof be introduced in evidence as part of the government's case; that it was then too late to make application for leave prior to the hearing today, but that this official printed matter had been shown this morning to counsel for the plaintiff; that counsel for the plaintiff had not objected to the form in which such evidence was now presented, but did object to its materiality or relevancy.

Counsel for the plaintiff objected thereupon to the above-quoted matter as mere instructions of the Commissioner of Internal Revenue to his subordinates and as irrelevant and immaterial herein, but the plaintiff did not object to the form in which such evidence was presented

by the defendant at this time. The Court overruled plaintiff's objection, allowing plaintiff an exception.

Thereupon, counsel for the government stated that no other provisions of the above-mentioned official printed government publication had any bearing upon this case and, without objection by counsel for the plaintiff, was permitted to withdraw the original document for return to the official files of the Bureau of Internal Revenue at Washington.

At the close of the argument, the cause was taken under advisement by the Court with leave to either party, if they hereafter should desire to call any later decisions on the question involved to the Court's attention, to submit a supplemental communication to the Court covering same, and furnish a copy to opposing counsel, provided they do this before the Court has rendered its decision.

The Court ordered that this memorandum of proceedings at the hearing be approved, filed and made part of the record in this cause, with exception reserved to the plaintiff as to the overruling of plaintiff's objection for irrelevancy or immateriality of the Commissioner's letter of instructions to Collectors hereinabove set forth.

Signed at Detroit, Michigan, this 15th day of April, 1946.

ARTHUR F. LEDERLE,
District Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 14, 1946)

FINDINGS OF FACT

1. This action involves a claim by plaintiff, J. H. Noble, for the recovery of some $21,000.00 paid as income taxes by plaintiff to defendant, Giles Kavanagh, Collector of Internal Revenue for this District, upon a deficiency

assessment levied upon the 1935 joint income tax return of plaintiff and his wife, who were at that time residents of this District. The case was heard April 15, 1946, on oral argument of amended cross motions for summary judgment, supplemented by written briefs. The case is at issue on plaintiff's third amended complaint and defendant's answer thereto. The facts are not in dispute and were stipulated through a series of pre-trial hearings under *Rule 16, Fed. Rules of Civil Procedure.*

2. Briefly, the pertinent facts are as follows. The impugned assessment was predicated upon the disallowance by the Collector of the taxpayers' right to deduct capital asset losses of the wife from capital asset gains of the husband, as a result of which plaintiff paid defendant the sum of $21,105.90 on July 21, 1937. On December 9, 1940, in *Helvering* v. *Janney*, 311 U. S. 189, the Supreme Court held that husband and wife taxpayers filing a joint return were entitled to such a deduction. On January 28, 1941, plaintiff and his wife filed a claim for refund of this $21,105.90, citing the four year from payment provision of *26 U.S.C.A. 3313* as the applicable limitation period for filing such claim, alleging the assessment and collection to have been illegal. On August 19, 1941, the Commissioner formally notified plaintiff and his wife by registered mail of the disallowance and rejection of said claim for refund as not being timely under the two year from payment provision of *26 U.S.C.A. 322 (b) (1)*. On July 10, 1943, this action was instituted.

3. The sole controversy here is whether the taxpayer's claim for refund, filed within four years after payment, is timely under *26 U.S.C.A. 3313*, as an erroneous and illegal assessment and collection, or whether it is barred under the two year after payment limitation period prescribed by *26 U.S.C.A. 322 (b) (1)*. This point was decided adversely to the Government's contentions by the Sixth Circuit Court of Appeals in *U. S.* v. *Federer Terminal Warehouse*, 139 F. (2) 679, which case has never been reversed or overruled. Defendant's counsel concede that if this court follows that ruling, plaintiff is entitled

to judgment upon his motion for summary judgment. Defendant has filed an exhaustive brief, containing, among other things, the legislative history of sections 3313 and 322, in an attempt to show that the last cited case, as well as the ones upon which it relies, were decided incorrectly.

4. The amount here involved, with interest at six per cent per annum from July 21, 1937, is $32,266.29 as of this date.

CONCLUSIONS OF LAW

1. This is a suit for recovery of an alleged erroneously and illegally assessed income tax, and, as such, is an action arising under a law providing for internal revenue, over which this court has jurisdiction.

28 U.S.C.A. 41 (5).

2. A decision of the Circuit Court of Appeals for the Sixth Circuit, construing the limitation provisions covering filing of claims for refund of taxes, as contained in the Internal Revenue Code, is binding upon District Courts in the Sixth Circuit, including this court, until reversed or overruled.

Seattle-First Nat. Bk. v. *U. S.* 44 F. S. 603, affirmed in 136 F. (2) 676 and 321 U. S. 583.

3. The law established for this Circuit by the Sixth Circuit Court of Appeals is that money paid under the circumstances here involved constitutes internal revenue taxes illegally and erroneously collected, in which event the taxpayer has four years after payment to file claim for refund, under *26 U.S.C.A. 3313*, rather than two years, as provided by *26 U.S.C.A. 322 (b) (1)* in case of an overpayment.

U. S. v. *Lederer Terminal Warehouse*, CCA 6, 139 F. (2) 679;

See also:

Huntley v. *Southern Oregon Sales Inc.*, CCA 9, 102 F. (2) 538, and *Olsen* v. *U. S.*, D. C. Cal., 32 F. S. 276, cited as authority in the Lederer case;

Penna. Co. (Tindle Est.) v. *U. S.*, CCA 3, 152 F. (2) 757;

International Arms. etc. Co. v. *U. S.*, *Ct. Cl.*, 37 F. (2) 771;

Liberty Glass Co v. *Jones*, D. C. Okla., ... F. S. ....., decided April 3, 1946.

4. Accordingly, the claim for refund having been filed within four years after the payment of taxes illegally and erroneously assessed and collected, and this suit having been instituted within two years after notification by registered mail of the rejection of the claim for refund, both the claim for refund and this suit are timely.

26 U.S.C.A. 3313, as interpreted by *U. S.* v. *Lederer Terminal Warehouse*, supra;
26 U.S.C.A. 3772 (a) (1) and (2).

5. Where, as here, a case is at issue, there is no dispute as to any material fact, and the plaintiff is entitled to judgment as a matter of law, plaintiff's motion for summary judgment should be granted.

Rule 56 (a) and (c), Fed. Rules of Civil Procedure.

6. Accordingly, a summary judgment is being entered simultaneously herewith for the sum of $32,266.29 in favor of plaintiff and against defendant.

Dated: May 14, 1946.

ARTHUR F. LEDERLE,
District Judge.

SUMMARY JUDGMENT FOR PLAINTIFF

(Filed May 14, 1946)

In accordance with findings of fact and conclusions of law filed simultaneously herewith,

It Is Hereby Ordered that plaintiff's motion for summary judgment, as amended, be, and the same is hereby granted, and that the plaintiff, J. H. Noble, recover of the defendant, Giles Kavanagh, the sum of $32,266.29.

It Is Further Ordered that defendant's motion for summary judgment of dismissal, as amended, be, and the same is hereby overruled.

ARTHUR F. LEDERLE,
District Judge.

MOTION FOR AMENDED FINDINGS AND JUDGMENT UNDER RULE 52 OR, IN ALTERNATIVE, FOR A NEW TRIAL UNDER RULE 59

(Filed May 24, 1946)

Now Comes the defendant, by his attorneys, John C. Lehr, United States Attorney for the Eastern District of Michigan, and Morris Zwerdling, Assistant United States Attorney for said district, and respectfully moves this court that Paragraph 4 of the findings of fact and Paragraph 6 of the conclusions of law, filed by this Honorable Court on the 14th day of May, 1946, be amended to read as follows:

"FINDINGS OF FACT

"4. The amount here involved is $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section

177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284).

"CONCLUSIONS OF LAW

"6. Accordingly, a summary judgment is being entered simultaneously herewith for the sum of $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284)."

Defendant also moves that Paragraph 2 of the summary judgment for plaintiff entered on the 14th day of May, 1946, by this Honorable Court be amended to read as follows:

"It Is Hereby Ordered that plaintiff's motion for summary judgment, as amended, be and the same is hereby granted and that the plaintiff J. H. Noble recover of the defendant, Giles Kavanagh, the sum of $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284)."

Said motion is made without prejudice to the right of the defendant to exercise his remedies by appeal from said judgment, if and when amended, and is made, for the following reasons:

The sum of $32,266.29, found to be due and owing by the court, ostensibly represents the sum of $21,105.90, together with interest from the date of payment to the Collector of Internal Revenue to the date of judgment at six per cent.

Judgment in this form would normally draw interest at the legal rate on the entire amount, or involve a liability for payment of interest on interest, contrary to the provisions of Section 177(b) of the Judicial Code, as amended (28 U.S.C. 1940, Sec. 284).

JOHN C. LEHR,
United States Attorney,

By MORRIS ZWERDLING,
Assistant United States Attorney,
Attorneys for Defendant.

Dated: May 24, 1946.

ORDER AMENDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed June 3, 1946)

On reading and filing defendant's motion for amendment of findings of fact and conclusions of law under the provisios of Rule 52 of the Federal Rules of Civil Procedure, and on the consent of counsel for plaintiff;

It Is Hereby Ordered that Paragraph 4 of the findings of fact, and Paragraph 6 of the conclusions of law, entered in the above-entitled cause on May 14, 1946, shall be and the same are hereby amended to read as follows:

FINDINGS OF FACT

4. The amount here involved is $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284).

CONCLUSIONS OF LAW

6. Accordingly, a summary judgment is being entered simultaneously herewith for the sum of $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1938 (28 U.S.C. 1940 Ed., Sec. 284).

ARTHUR F. LEDERLE,
District Judge.

AMENDED SUMMARY JUDGMENT FOR PLAINTIFF

(Filed June 3, 1946)

On reading and filing defendant's motion for amendment of judgment for plaintiff and on the consent of the plaintiff hereto, the judgment entered in the above-entitled cause on May 14, 1946, shall be and the same is hereby amended to read as follows:

In accordance with findings of fact and conclusions of law filed simultaneously herewith,

It Is Hereby Ordered that plaintiff's motion for summary judgment, as amended, be, and the same is hereby granted, and that the plaintiff, J. H. Noble, recover of the defendant, Giles Kavanagh, the sum of $21,105.90, together with interest thereon to be computed from and after the date of payment thereof to the defendant on July 21, 1937, as provided by Section 177(b) of the Judicial Code, as amended by Section 808 of the Revenue Act of 1936 (28 U.S.C. 1940 Ed., Sec. 284).

It Is Further Ordered that defendant's motion for summary judgment of dismissal, as amended, be, and the same is hereby overruled.

ARTHUR F. LEDERLE,
District Judge.

NOTICE OF APPEAL

(Filed August 5, 1946)

Notice is hereby given that Giles Kavanagh, defendant above named, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the judgment entered in this action on May 14, 1946, as modified under the amended judgment entered on June 3, 1946, against the defendant in the sum of $21,105.90, plus interest computed thereon after July 21, 1937, according to law.

JOHN C. LEHR,
United States Attorney.

By: MORRIS ZWERDLING,
Assistant United States Attorney,
Attorneys for Defendant.

Dated: August 5, 1946.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

(Filed August 13, 1946)

Giles Kavanagh, defendant and appellant herein, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal as follows:

1. Third amended complaint.
2. Answer to third amended complaint.
3. Plaintiff's motion for summary judgment.
4. Defendant's motion for summary judgment.
5. Agreed statement of facts.

6. Memorandum of court regarding procedure at hearing.
7. Findings of fact and conclusions of law.
8. Summary judgment for plaintiff.
9. Defendant's motion for amendment of findings and judgment.
10. Order amending findings of fact and conclusions of law.
11. Amended summary judgment.
12. Notice of appeal.
13. Stipulation re comparison of record.
14. This Designation.
15. Statement of Points on which appellant intends to rely.

JOHN C. LEHR,
United States Attorney,

BY MORRIS ZWERDLING,
Assistant United States Attorney,
Attorneys for Defendant

Dated: August 12, 1946.

STIPULATION RE COMPARISON OF RECORD

(Filed Aug. 22, 1946)

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

EUGENE M. BAYNES & W. H. HARRIS,

By W. H. HARRIS,
JULIUS L. BERNS,
JULIUS L. BERNS,
Attorneys for Plaintiff,

JOHN C. LEHR,
United States Attorney,

By MORRIS ZWERDLING,
United States Attorney,
Attorneys for Defendant.

Dated: August 19, 1946.

CERTIFICATE OF THE CLERK

EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION.

I, George M. Read, clerk of the United States District Court for said District, do hereby certify that the within and foregoing numbered pages contain a full and complete copy of all papers filed and all proceedings in said cause, in accordance with the appellant's designation of contents of record on appeal and in accordance with the stipulation entered into between attorneys for respective parties in said cause, waiving comparison by the clerk of the record on appeal.

In Testimony Whereof, I have hereunto signed by name and affixed the seal of said Court at Detroit, this ..... day of ....., A.D. 1946.

GEORGE M. READ,
Clerk, United States District Court,
Eastern District of Michigan.

By .....
Deputy Clerk.

TRANSCRIPT OF PROCEEDINGS FOR CERTIORARI APPLICATION

Cause argued and submitted

February 10, 1947

Before SIMONS, MARTIN, and MILLER, Circuit Judges

This cause is argued by S. Walter Shine for Appellant and by Julius L. Berns for Appellee and is submitted to the court.

Judgment

Filed February 11, 1947

This appeal has been considered on the record and on the oral arguments and printed briefs of attorneys for the appellant and for the appellee, respectively; and it appearing that reversal of the judgment below would necessitate overruling the previous decision of this court in *United States* v. *The Lederer Terminal Warehouse Company*, 139 F. (2d) 679 (C. C. A. 6), and no valid reason being presented for overruling that decision, the judgment of the district court is affirmed.

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Giles Kavanagh, Collector of Internal Revenue*, vs. *J. H. Noble*, No. 10,331, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 1st day of April A. D. 1947.

[SEAL]

(S) J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1947

738420—47

Supreme Court of the United States

Order allowing certiorari

Filed June 2, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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CITATIONS

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739742—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1264

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

J. H. NOBLE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Sixth Circuit entered February 11, 1947, affirming the judgment of the District Court of the United States for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

The opinion of the District Court (R. 34–37, 40–41) is reported in 66 F. Supp. 258. The judgment of the Circuit Court of Appeals (R. 46) has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 11, 1947. (R. 46.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether claims for refund of income taxes must be filed within two years after the payment of the tax, as provided by Section 322 (b) of the Internal Revenue Code, or within four years after the payment of the tax, as provided by Section 3313 of the Code.

STATUTES AND REGULATIONS INVOLVED

The provisions of the statutes and regulations are set forth in our petition in *Jones* v. *Liberty Glass Co.*, which is being filed simultaneously with the petition herein.[1] Section 322 (a) and (b) of

[1] The tax here involved is income tax for the taxable year 1935. Income taxes for taxable years beginning prior to January 1, 1939, remain subject to the statutory provisions in effect prior to the Code. Section 1 of the Internal Revenue Code (26 U. S. C. 1). However, Section 322 (b) of the Revenue Act of 1934, and Section 3228 (a) of the Revised Statutes as it read in 1935 are the same as Section 322 (b) and Section 3313 of the Code, and there is no material difference in the statutory situation in effect in 1935 and under the Code so far as the argument here made is concerned. Moreover, the taxpayer relied upon Section 3313 of the Code in its claim for refund and has continued to rely upon it. In view of all this, it is believed confusion is avoided and ease of reference facilitated by discussing Section 322 (b) and Section 3313 of the Code as the statutes involved.

the Revenue Act of 1934, c. 277, 48 Stat. 680, is the same as Section 322 (a) and (b) of the Internal Revenue Code; Section 3228 (a) of the Revised Statutes as it read in 1935 is the same as Section 3313 of the Code; and Article 322–7 of Regulations 86, promulgated under the Revenue Act of 1934, is the same as Section 29.322–7 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

STATEMENT

The facts as stipulated (R. 16–27) were found by the District Court (R. 34–36) and may be summarized as follows:

On March 16, 1936, the taxpayer filed with the Collector a joint individual income tax return for himself and wife for the calendar year 1935, disclosing a tax liability of $8,017.01, which was duly paid. In the return losses and gains from sales of capital assets by taxpayer and his wife were reported together, the losses of the wife being deducted from the gains of the husband, resulting in the net loss in excess of $2,000, which amount (the allowable limit of losses) was deducted in the return. (R. 16, 17.)

On June 6, 1937, the taxpayer was advised in a conference hearing in the office of the Internal Revenue Agent in Charge at Detroit that there was additional income tax due for the year 1935 with interest due aggregating $421.80. The taxpayer gave to the Internal Revenue Agent in

Charge his check made payable to the Collector of Internal Revenue for the $421.80. The check was later returned to the taxpayer without having been delivered to the Collector. The taxpayer and his wife on June 7, 1937, executed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" providing for the immediate assessment of the deficiency $421.80. Such consent was never used by the Bureau of Internal Revenue. (R. 17.)

By letter dated June 11, 1937, George E. Neal, Internal Revenue Agent in Charge at Detroit, notified the taxpayer that instead of a deficiency of $421.80 on the 1935 income tax return there was a deficiency of $19,973.93 and the taxpayer was furnished a computation showing the basis of such determination. (R. 17–23.)

After protest and further conference, taxpayer's check for $421.80 was returned to him on July 14, 1937, and he gave the Internal Revenue Agent in Charge a new check for $21,527.70 payable to the Collector covering the then proposed deficiency assessment of tax of $19,973.93, plus interest computed thereon of $1,553.77. The check for $21,527.70 was received on July 21, 1937, by the Collector, who remitted it to the Treasury of the United States as a collection of internal revenue. (R. 23.)

On July 14, 1937, taxpayer and his wife executed another waiver agreement under which they

waived certain statutory restrictions in their favor and consented to the immediate assessment and collection against them of 1935 income tax in the principal sum of $19,973.93, plus deficiency interest of $1,553.77, which the Commissioner thereafter assessed. (R. 23–24.) The waiver agreement executed July 14, 1937, contained a printed footnote reading in part as follows (R. 24):

> The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 606 of the Revenue Act of 1928 and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.
>
> If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, * * *.

On January 28, 1941, the taxpayer and his wife filed a claim for refund of $21,105.90, plus interest, on the following ground (R. 24–25):

> The Internal Revenue Department refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband and wife, and made an extra assessment on July 11, 1937,

in the principal sum of $19,973.93 and interest in the sum of $1,553.77, which amounts were paid under protest on July 14, 1937. We claim this to be an illegal assessment and collection, and that it should be refunded to the claimants. United States Code Annotated, Title 26, Section 3313.

By registered mail the Commissioner of Internal Revenue on August 19, 1941, rejected the claim for refund of taxpayer and his wife. In that letter the Commissioner referred to an earlier communication sent to the taxpayer and his wife on April 25, 1941, which stated the following (R. 25):

> Claim filed January 28, 1941, for the refund of $19,973.93 additional tax and $1,553.77 interest paid July 21, 1937 on 1935 income tax return is rejected in accordance with Sec. 322 (b) (1) of the Revenue Act of 1934, which reads in part as follows:
>
> "Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later."
>
> Section 3313 of the Internal Revenue Code, referred to in the claim specifically excludes income taxes from the taxes for which a claim may be filed within four years after payment.

On July 12, 1941, the taxpayer transmitted to and filed with the Collector his individual claim for refund of $21,527.70 paid with respect to the year 1935. The claim was on the same grounds as a claim filed by taxpayer and his wife on January 28, 1941. This claim was returned to the taxpayer by the Collector with the request that the taxpayer's wife join in the execution of the claim, which request was refused and the claim was returned to the Collector on September 23, 1941, and on October 3, 1941, the Collector again returned the claim to the taxpayer. (R. 25–26.)

For the purpose of a breakdown of the deficiency collection of 1935 income tax and deficiency interest totalling $21,527.70 hereinbefore mentioned, (a) $21,105.90 thereof may be allocated to the Commissioner's adjustment increasing the reported income under the joint return by $45,049.45 under his ruling that losses sustained by taxpayer's wife from the sale of her capital assets could not be offset against gains derived by the taxpayer from the sale of his capital assets during the taxable years; and (b) the balance of the payments consisting of tax deficiency and interest thereon paid to the extent of $421.80 may be allocated to certain other adjustments made by the Commissioner to the returned income for the year 1935, the propriety of which is not in question in this proceeding. (R. 26.)

This action was commenced on July 10, 1943. (R. 27.) Both parties moved for summary judgment on the pleadings and agreed statements of facts. (R. 27–30.) The District Court on May 14, 1946, held that the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679, controlled the case, and entered a summary judgment in favor of the taxpayer (R. 36–40, 41), and the Circuit Court of Appeals affirmed. (R. 46.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that claims for refunds of erroneous assessments of income taxes are governed by the limitation provisions of Section 3313 of the Internal Revenue Code.

2. In holding that Section 322 (b) of the Internal Revenue Code is not applicable to erroneous assessments of income taxes.

3. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

This is a companion case to *Jones* v. *Liberty Glass Co.*, in which a petition for certiorari is being filed simultaneously with the petition in the instant case. The statutory period of limitations involved in this case is the same as that in issue in the *Liberty Glass* case. All of the reasons for

granting the writ relied upon in our petition in the latter case are equally applicable here.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 70

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

J. H. NOBLE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 34–37, 40–41) is reported in 66 F. Supp. 258. The judgment of the Circuit Court of Appeals (R. 46) has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 11, 1947. (R. 46.) The petition for a writ of certiorari was filed on April 18, 1947, and was granted on June 2, 1947. (R. 47.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether claims for refund of income taxes must be filed within two years after the payment of the tax, as provided by Section 322 (b) of the Revenue Act of 1934 and of the Internal Revenue Code, or within four years after the payment of the tax, as provided by Section 3313 of the Code.

STATUTES AND REGULATIONS INVOLVED

The provisions of the statutes and regulations are set forth in our brief in *Jones* v. *Liberty Glass Co.*, No. 71, which is being filed herewith. The provisions of Section 322 (a) and (b) of the Revenue Act of 1934, c. 277, 48 Stat. 680, are substantially the same as the corresponding provisions in Section 322 (a) and (b) (1) of the Revenue Act of 1938 and of the Internal Revenue Code; Section 3228 (a) of the Revised Statutes as it read in 1935 and thereafter is the same as Section 3313 of the Code; and Article 322–7 of Regulations 86, promulgated under the Revenue Act of 1934, is the same as Section 29.322–7 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

STATEMENT

The facts as stipulated (R. 16–27) were found by the District Court (R. 34–36) and may be summarized as follows:

On March 16, 1936, the taxpayer filed with the Collector a joint individual income tax return for himself and wife for the calendar year 1935, dis-

closing a tax liability of $8,017.01, which was duly paid. In the return losses and gains from sales of capital assets by taxpayer and his wife were reported together, the losses of the wife being deducted from the gains of the husband, resulting in a net loss in excess of $2,000, which amount (the allowable limit of losses) was deducted in the return. (R. 16, 17.)

On June 7, 1937, the taxpayer was advised in a conference hearing in the office of the Internal Revenue Agent in Charge at Detroit that there was additional income tax due for the year 1935 with interest due aggregating $421.80. The taxpayer gave to the Internal Revenue Agent in Charge his check made payable to the Collector of Internal Revenue for the $421.80. The check was later returned to the taxpayer without having been delivered to the Collector. The taxpayer and his wife on June 7, 1937, executed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" providing for the immediate assessment of the deficiency of $421.80. Such consent was never used by the Bureau of Internal Revenue. (R. 17.)

By letter dated June 11, 1937, George E. Neal, Internal Revenue Agent in Charge at Detroit, notified the taxpayer that instead of a deficiency of $421.80 on the 1935 income tax return there was a deficiency of $19,973.93 and the taxpayer was furnished a computation showing the basis of such determination. (R. 17–23.)

After protest and further conference, taxpayer's check for $421.80 was returned to him on July 14, 1937, and he gave the Internal Revenue Agent in Charge a new check for $21,527.70 payable to the Collector covering the then proposed deficiency assessment of tax of $19,973.93, plus interest computed thereon of $1,553.77. The check for $21,527.70 was received on July 21, 1937, by the Collector, who remitted it to the Treasury of the United States as a collection of internal revenue. (R. 23.)

On July 14, 1937, taxpayer and his wife had executed another waiver agreement under which they waived certain statutory restrictions in their favor and consented to the immediate assessment and collection against them of 1935 income tax in the principal sum of $19,973.93, plus deficiency interest of $1,553.77, which the Commissioner thereafter assessed. (R. 23–24.) The waiver agreement executed July 14, 1937, contained a printed footnote reading in part as follows (R. 24):

> The execution and filing of this waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under Section 606 of the Revenue Act of 1928 and does not, therefore, preclude the assertion of a further deficiency in the manner provided by law should it subsequently be determined that additional tax is due, nor does it extend the statutory period of limi-

tation for refund, assessment, or collection of the tax.

If this waiver is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, * * *.

On January 28, 1941, the taxpayer and his wife filed a claim for refund of $21,105.90, plus interest, on the following ground (R. 24–25):

> The Internal Revenue Department refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband and wife, and made an extra assessment on July 11, 1937 in the principal sum of $19,973.93 and interest in the sum of $1,553.77, which amounts were paid under protest on July 14, 1937. We claim this to be an illegal assessment and collection, and that it should be refunded to the claimants. United States Code Annotated, Title 26, Section 3313.

By registered mail the Commissioner of Internal Revenue on August 19, 1941, rejected the claim for refund of taxpayer and his wife. In that letter the Commissioner referred to an earlier communication sent to the taxpayer and his wife on April 25, 1941, which stated the following (R. 25):

> Claim filed January 28, 1941 for the refund of $19,973.93 additional tax and $1,553.77 interest paid July 21, 1937 on 1935 income tax return is rejected in ac-

cordance with Sec. 322 (b). (1) of the Revenue Act of 1934, which reads in part as follows:

"Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later."

Section 3313 of the Internal Revenue Code, referred to in the claim specifically excludes income taxes from the taxes for which a claim may be filed within four years after payment.

On July 12, 1941, the taxpayer transmitted to and filed with the Collector his individual claim for refund of $21,527.70 paid with respect to the year 1935. The claim was on the same grounds as a claim filed by taxpayer and his wife on January 28, 1941. This claim was returned to the taxpayer by the Collector with the request that the taxpayer's wife join in the execution of the claim, which request was refused and the claim was returned to the Collector on September 23, 1941, and on October 3, 1941, the Collector again returned the claim to the taxpayer. (R. 25–26.)

For the purpose of a breakdown of the deficiency collection of 1935 income tax and deficiency interest totalling $21,527.70 hereinbefore mentioned, (a) $21,105.90 thereof may be allocated

to the Commissioner's adjustment increasing the reported income under the joint return by $45,049.45 under his ruling that losses sustained by taxpayer's wife from the sale of her capital assets could not be offset against gains derived by the taxpayer from the sale of his capital assets during the taxable years; and (b) the balance of the payments consisting of tax deficiency and interest thereon paid to the extent of $421.80 may be allocated to certain other adjustments made by the Commissioner to the returned income for the year 1935, the propriety of which is not in question in this proceeding. (R. 26.)

This action was commenced on July 10, 1943. (R. 27.) Both parties moved for summary judgment on the pleadings and agreed statements of facts. (R. 27–30.) The District Court on May 14, 1946, held that the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679, controlled the case, and entered a summary judgment in favor of the taxpayer. (R. 36–40, 41), and the Circuit Court of Appeals affirmed (R. 46).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that claims for refund of erroneous assessments of income taxes are governed by the limitation provisions of Section 3313 of the Internal Revenue Code.

2. In holding that the provisions of Section 322 (b) of the Revenue Act of 1934 and of the Internal Revenue Code are not applicable to erroneous assessments of income taxes.

3. In affirming the judgment of the District Court.

ARGUMENT

This is a companion case to *Jones* v. *Liberty Glass Co.*, in which the Government's brief has been filed. Although the two cases involve different tax years the question whether Section 322 (b) applies to erroneous assessments of income taxes which is presented by this case is the same as that in issue in the *Liberty Glass* case. All of the reasons given for the reversal of the Circuit Court of Appeals decision in that case are equally applicable here.

CONCLUSION

The decision below is erroneous and should be reversed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ARNOLD RAUM,
HELEN R. CARLOSS,
LEE A. JACKSON,
S. WALTER SHINE,
Special Assistants to the Attorney General.

OCTOBER 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1264

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

J. H. NOBLE, RESPONDENT

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF OPPOSING THE GRANT OF THE WRIT

E. M. BAYNES
W. H. HARRIS
JULIUS L. BERNS
Attorneys for Respondent

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SUPREME COURT OF THE UNITED STATES

No. 1264

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

J. H. NOBLE, RESPONDENT

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF OPPOSING THE GRANT OF THE WRIT

The petitioner has not served the respondent with any copy of any grounds or reasons on which the petition is based, merely stating (Pet. p. 8), "All of the reasons for granting the writ relied upon in our petition in the latter case (*Jones v. Liberty Glass Company*) are equally applicable here."

The *Liberty Glass Company* case (involving $1,053.49) and the instant case are in some respects dissimilar. Here, there was not a failure to allow a taxpayer an allowable right, but a Regulation of the Commissioner approved by the Secretary of the Treasury (*Reg.* 86, *Art.* 117-5) sought to impose a tax on the gains of the husband from sales of capital assets which were exceeded by the losses of the wife from like sales.

though a joint return was filed, which was not a tax "imposed by this chapter" (*I.R.C. Sec.* 322). That Regulation was declared invalid by this Court in *Helvering v. Janney, et al,* 311 U. S. 189, and the next month this claim for refund was filed.

While not advised as to reasons on which the petition is based it is believed that no reasons could be assigned that would qualify under the rules and practices of the Court as sufficient upon which to base the issuance of the writ.

There has been no diversity of decisions of courts on the question here presented. Five District Courts and three Circuit Courts of Appeal, one of them—the Sixth—in two cases, have passed upon the question. These courts have been unanimous in holding that where money is collected illegally for a tax though the tax was not imposed by law the four year limitation for the filing of claims for refunds applies.

The unanimity of court decisions in construing the relevant statutes would indicate that there is not even any need to direct attention to the often announced principle that tax laws should be construed in favor of the taxpayer and particularly where the taxpayer is entitled to refund except for the bar of the statute of limitations.

The matter is not of general importance. In the more than thirty years of income tax litigation there are reported only five cases including the instant case in which the question has been at issue:

1. *Huntley v. Southern Oregon Sales, Inc.,* 102 F(2nd) 538 (C.C.A. 9), affirming the District Court.

With reference to this case the Solicitor General formally announced that no petition for certiorari would be filed (Prentice-Hall Federal Tax Service 1939, Vol. I, Section 4.35).

The opinion in that case contains an exhaustive historical analysis of the limitation sections, one applying to lawfully imposed taxes and the other to sums collected illegally.

2. *Olsen v. United States*, 32 Fed. Supp. 276 (D.C.S.D. Cal.).

In this case no appeal is reported to have been taken.

3. *U. S. v. Lederer Terminal Warehouse Co.*, 139 F(2nd)679 (C.C.A. 6), affirming the decision of the District Court.

4. *H. C. Jones, Collector, v. Liberty Glass Co.*, 159 F(2nd)316 (C.C.A. 10th), affirming the decision of the District Court reported in 66 F. Supp. 254.

5. *Giles Kavanagh, Collector v. J. H. Noble*, 160 F(2nd)104(2) (C.C.A. 6th), affirming the District Court, reported in 66 F. Supp. 258.

During the more than eight years following the very exhaustive opinion of the Circuit Court of Appeals for the Ninth Circuit in *Huntley vs. Southern Oregon Sales, Inc.* (*supra*) the Congress has enacted several revenut acts and several amendments but nowhere indicated any intention to change the laws applicable to refunds of excess payments of taxes lawfully imposed and of sums collected as for taxes but which had not been imposed by law.

Not only should the unanimity of the nine courts in construing these statutes seem to relieve the question

from any doubt, but the Congress itself since the insertion of the exceptive clause in Revised Statutes 3228 has specifically stated that Revised Statutes 3228 (Code Sec. 3313) does apply to income taxes.

The first time the exceptive clause appears in Revised Statutes 3228 was in *Section 1316 of the Revenue Act of* 1921 providing:

> "This section (R.S. Section 3228) except as modified by Sec. 252 shall apply retroactively to claims for refunds, etc."

The words "Section 252" of the Revenue Act of 1921 were changed in the 1924 Act to "Section 281" and in the 1926 Act to "Section 284" because of the change in section numbers of the various acts and then apparently to obviate the need for the continued change of section numbers the wording of the exceptive clause was changed to "except as otherwise provided by law in the case of income,—war profits, excess profits, estate and gift taxes".

In considering the 1923 Amendment to the Revenue Act of 1921, the Ways and Means Committee reported (*H. Rep.* 1424, 67*th Cong.*, 4*th Sess.*, p. 2) and the Senate Finance Committee adopted (*S. Rep.* 1137, 67*th Cong.*, 4*th Sess.*) and the Congress enacted as follows:

> "Where a tax has been paid under the provision of section 221 or 237 in excess of that properly due, any refund or credit made under the provisions of this section or section 3228 of the Revised Statutes shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent." 42 *U. S. Stat. at Large* 1504-5.

Thus the statute states that income taxes may be refundable under *Revised Statutes* 3228 (I.R.C. 3313). The Congress and the courts being in agreement there would seem to be no need for further judicial construction.

When the Congress desired to except all income taxes from the operation of any statute it had no difficulty in saying so. It was desired that *Code Section* 3312 should not apply to income, etc., taxes. Consequently that section reads: "Except in the case of income, etc., taxes—all internal revenue taxes shall, etc., be assessed within four years after such taxes became due - - - - ". Very different from *Code Section* 3313.

The fact that the Congress obviously took trouble to shift from one form of expression to another - - - to use one set of words instead of another - - - is another reason for assuming that they meant what they said and not what they did not say.

Respectfully submitted,

E. M. BAYNES.
West Palm Beach, Florida.

W. H. HARRIS
Fort Valley, Georgia.

JULIUS L. BERNS
Detroit, Michigan.
Attorneys for Respondent.

Note: Copy of the petition in No. 1265, *Liberty Glass Co.* case, pursuant to request therefor, was furnished respondent's counsel after this brief was being printed, but it is not deemed necessary to amend or enlarge the brief.

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IN THE

Supreme Court of the United States

No. 70.

October Term, 1947.

GILES KAVANAGH, Collector of Internal Revenue,
Petitioner,

v.

J. H. NOBLE,
Respondent.

RESPONDENT'S MOTION TO DISMISS WRIT OF CERTIORARI.

E. M. BAYNES,
West Palm Beach, Florida,

W. H. HARRIS,
Fort Valley, Georgia,

JULIUS L. BERNS,
984 Penobscot Building,
Detroit, Michigan,
Attorneys for Respondent.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States.

No. 70. OCTOBER TERM, 1947.

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE,

Petitioner,

v.

J. H. NOBLE,

Respondent.

MOTION TO DISMISS WRIT OF CERTIORARI.

Now comes J. H. Noble, respondent herein, and moves the Court to dismiss the writ of certiorari heretofore granted and upon the following grounds:

1. The petition does not contain "a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question" as provided in Rule 38, paragraph 2, of the Rules of this Court, in which Rule reference is made on that point to Rule 12, paragraph 1.

2. The petition does not contain a statement required by the referred to Rule 12, paragraph 1, providing:

> "The statement shall show that the nature of the case and of the rulings of the court was such as to bring the case within the jurisdictional provisions relied on . . ."

3. The petition does not show as required by Rule 38, paragraph 2, "The reasons relied on for the allowance of the writ."

(a) Under the heading "Reasons for Granting the Writ" the petitioner states:

> "This is a companion case to *Jones v. Liberty Glass Co.*, in which a petition for certiorari is being filed simultaneously with the petition in the instant case. The statutory period of limitations involved in this case is the same as that in issue in the *Liberty Glass* case. All of the reasons for granting the writ relied upon in our petition in the latter case are equally applicable here" (Pet. 8).

(b) Respondent's counsel were not served with copy of the petition in the *Liberty Glass Company* case (No. 71, October Term, 1947) and had no knowledge of the grounds upon which the petition was based until after their brief opposing the grant of the writ had been prepared, though by wiring for it a copy of the petition in the *Liberty Glass Company* case was obtained just before filing the brief.

(c) Respondent's counsel were not able to obtain a copy of the Transcript of Record in the referred to *Liberty Glass Company* case until after the petition for the writ of certiorari had been granted in the instant case.

(d) Upon examining the Transcript of Record in that case it is seen that there is no point of similarity between the facts in the *Liberty Glass Company* case and those in the instant case, nor any likeness in any respect except that both cases do involve the statute of limitations.

(e) The overpayment complained of in the *Liberty Glass Company* case was the result of the failure of the revenue agent "to allow any credit for the money used to retire

indebtedness" (R. 2, 7, 17 (7)). It is clear from the record that this was a mere inadvertence and overlooked by the Revenue agent and by the taxpayer until subsequently "discovered" (R. 2, 15 (2)).

(f) The collection complained of in the instant case was no inadvertence, it was protested (R. 5 (10)), and the collection was made as the result of a Regulation of the Commissioner approved by the Secretary of the Treasury (Reg. 86, Art. 117-5) seeking to impose a tax on this taxable unit, husband and wife, not imposed by any law, reading so far as material as follows:

> "In the application of Section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers" (R. 8 Ex. "A").

(g) In the instant case respondent and his wife filed a joint return in which the losses and gains from sales of capital assets by respondent and by his wife were reported together resulting in a net loss in excess of $2,000.00 (R. 17 (5)) which the Commissioner, under said Regulation, refused to allow to be done, and collected from the respondent the sum here involved, (R. 26 (17)) as for tax on these sales of capital assets from which the taxable unit suffered a loss.

(h) In the *Liberty Glass Company* case one of the "reasons for granting the writ" is the statement: "The importance of the question presented, involving, as it does, the great mass of claims for refund of income taxes, is manifest" (Pet. 7 (1)).

In all the many thousands of cases involving claims for refund of income taxes, from the beginning of income tax litigation to the present time, there have been only four in which there has been presented the question as to the limitation applicable to the refund of a collection as for an income tax but not imposed by any statute.

WHEREFORE, Respondent prays for the grant of this moiton to dismiss the Writ of Certiorari in this case.

Respectfully submitted,

E. M. BAYNES,
West Palm Beach, Florida.
W. H. HARRIS,
Fort Valley, Georgia.
JULIUS L. BERNS,
984 Penobscot Building,
Detroit, Michigan.
Attorneys for Respondent.

BRIEF IN SUPPORT OF MOTION TO DISMISS WRIT OF CERTIORARI.

This motion is in the interest of the orderly processes of this Court whose docket it is believed should not be burdened with inappropriate cases.

The petition contains no grounds for granting the writ except by reference to another case, *Jones v. Liberty Glass Co.* (No. 71, October Term, 1947) as set out in paragraph 3 (a) of this motion.

When it appears from the records that the two cases are not the same the petition in this case contains no grounds or reasons for granting the writ.

For convenience these two cases will be referred to as *Liberty Glass Co.* case and *J. H. Noble* case.

Chief Justice Taft considered the same point in *Layne and Bowler Corp. v. Western Well Works, et al.*, 261 U. S. 387, 393, in which the headnote reads:

> "A writ of certiorari, issued to settle a supposed conflict of decision between two circuit courts of appeal concerning the validity and scope of a patent, will be dismissed, as improvidently granted, when later examination proves that such conflict did not exist."

And the opinion concluded:

> "The two decisions not being in conflict there was no ground for our allowing the writ of certiorari to add to an already burdened docket"—and dismissed the writ, citing *Furness, Withy & Co. v. Yang-Tsze Insurance Association*, 242 U. S. 430 and *U. S. v. Rimer*, 220 U. S. 547.

Layne and Bowler Corporation case, *supra*, was cited with approval and writ dismissed in *Erie Railroad Company v. Kirkendall*, 266 U. S. 185, 186.

The two cases are dissimilar in that (1) the issues presented are not alike and (2) the *J. H. Noble* case presents

no "question of general importance" nor does it involve "the great mass of claims for refund of income taxes" as stated on page 7 of the petition in the *Liberty Glass Company* case.

(1) The Issues in the Two Cases Are Not Alike.

The *Liberty Glass Company* case is an income tax case. The *J. H. Noble* case is not.

In the *Liberty Glass Company* case there was a mere factual omission to give the taxpayer an allowable credit, a usual ground for claims for refund. There was no regulation denying such credit, but only an excessive collection of a lawfully imposed tax.

The *J. H. Noble* case involves a "sum . . . wrongfully collected" (Code Sec. 3313), called by the Commissioner an income tax, but not a tax authorized by the Sixteenth Amendment, nor any tax imposed by any law. It was a collection exacted from a taxable unit—husband and wife—on sales of capital assets that resulted in a loss, which this Court held could not be done, and voided the regulation (Reg. 86, Art. 117-5, *supra*) under which the collection was made. *Helvering v. Janney, et al.*, 311 U. S. 189.

In the *J. H. Noble* case no income tax was owing. Return had been filed and all income tax for the year had been paid (R. 23 (9)). It was not a tax of any kind. The Commissioner merely called it an income tax. It might better have been called a loss tax or some excise tax.

(2) The J. H. Noble Case Involves No Question of General Importance.

So far as careful study discloses during more than thirty years of income tax litigation involving many thousands of suits for refunds of income taxes, or of collections purported to be as for income taxes, barring what is now pending in this Court there have been only four cases which have brought in question the period of limitation appli-

cable to the refund of a sum collected as for an income tax but which had not been imposed by any law.

1. **Huntley v. Southern Oregon Sales, Inc.**, 102 F. (2nd) 538 (C. C. A. 9th). With reference to this case the Solicitor General announced that no petition for certiorari would be filed. (Prentice-Hall Federal Tax Service 1939, Sec. 4.35.)

2. **Olsen v. United States** 32 Fed. Supp. 276 (D. C. S. D. California). No appeal was taken from this case.

3. **United States v. Lederer Terminal Warehouse Co.**, 139 F. (2nd) 679 (C. C. A. 6th). In affirming the decision of the District Court in that case the Court said:

> "The conclusion which has been reached is in consonance with *Huntley v. Southern Oregon Sales, Inc.*, 9 Cir. 102 F. (2nd) 538, wherein Judge Haney detailed legislative history pertinent here. See also *Olsen v. United States*, D. C., 32 F. Supp. 276. The fact that in the cited cases, *no tax whatever* was due from the taxpayer while in the instant case, *no additional tax* was due is deemed immaterial." (Emphasis the court's.)

No petition for certiorari was filed in this case.

4. **Sbarboro v. United States, 1947 P-H Tax Service 72485.** In this case decided May 29 1947, income tax had been collected on income on which the Congress had imposed no tax. The court discussed the contentions of the Commissioner as now made in the *Liberty Glass Co.* case, and held that the four years limitation applied.

The above list of four cases, in none of which was there disagreement, exhausts the prior cases involving funds of illegally collected sums as for income taxes but not imposed by any law, so that the matter would hardly seem to be "a question of general importance" or to involve "the great mass of claims for refund of income taxes" as stated on page 7 of the petition for the writ in the *Liberty Glass Company* case.

Based on the available statistics from the Department of Justice it has been estimated that suits against the United States and against Collectors for refunds of income taxes average approximately five hundred cases a year, and yet there have been only four prior reported cases involving the period of limitation applicable to refunds of illegal collections made as for income tax but not imposed by any law.

Respondent's counsel can have no information as to the many cases similar to the *Liberty Glass Co.* case now pending in the district courts mentioned in the petition in that case (P. 8), but if all of them are like the *Liberty Glass Co.* case as stated in that petition, they can have no relevancy to the wholly different situation presented in the instant case.

This Court considered a like situation in *Southern Power Company v. North Carolina Public Service Co., et al.*, 263 U. S. 508, in which the head note reads:

> "A writ of certiorari, granted under the impression, induced by the petition, that a question of public importance is involved, will be dismissed when the argument reveals that the impression was erroneous."

Similarly in *United States v. Rimer*, 220 U. S. 547, it was stated in the head note:

> "When certiorari is granted on the basis that the decision below involved principles of far-reaching effect and overthrows settled administrative construction, and it appears on the argument that the decision does not deal with such principles or have such effect, and that the action of the court below was not, either as to its character or importance, within the scope of the grant of power given by the Judiciary Act of 1891 to review by certiorari, the writ will be dismissed."

To the same effect is *Furness, Withy & Company, Ltd. v. Yang-Tsze Insurance Association, et al.*, 242 U. S. 430, where it is stated:

"Petition for writs of certiorari are at the risk of the parties making them, and whenever in the progress of the cause facts develop which if disclosed on the application would have induced a refusal, the court may upon motion by a party or *ex mero motu* dismiss the writ."

"Such petitions should be carefully prepared, contain appropriate references to the record, and present with studied accuracy, brevity and clearness whatever is essential to ready and adequate understanding of points requiring the court's attention."

Nor is there any administrative difficulty to be resolved. The Bureau has no trouble in drawing the distinction between "legally collected taxes" and "illegally assessed and collected taxes" and provides in Mimeograph 3958 (C. B. XI-2, 23) and Mimeograph 4564 (C. B. 1397-1, 93) that refunds of taxes "legally collected" shall be treated as income for the taxable year in which the refund is made, while a different treatment is provided in the case of a refund of "taxes illegally assessed and collected". (1947 Prentice-Hall Tax Service, 7370.)

The writ having been issued under the misapprehension, induced by the petition, that the issue in this case is the same as that in the *Liberty Glass Company* case, and that it involves a question of general importance affecting the great mass of claims for refunds of income taxes, it would seem proper that the writ be dismissed.

Respectfully submitted,

E. M. Baynes,
West Palm Beach, Florida,
W. H. Harris,
Fort Valley, Georgia,
Julius L. Berns,
984 Penobscot Building,
Detroit, Michigan,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

No. 70.

October Term, 1947.

GILES KAVANAGH, Collector of Internal Revenue,
Petitioner,

v.

J. H. NOBLE,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RESPONDENT.

E. M. BAYNES,
W. H. HARRIS,
JULIUS L. BERNS,
Attorneys for Respondent.

J. OTTO ORTWEIN,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States.

No. 70. OCTOBER TERM, 1947.

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE,
Petitioner,

v.

J. H. NOBLE,
Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Michigan is reported in 66 F. Supp. 258, and the affirming opinion of the Circuit Court of Appeals for the Sixth Circuit in 160 F. (2nd) 104.

QUESTION PRESENTED.

The statement of the question appearing on page 2 of the petitioner's brief can have no application to the facts in the instant case. The real question presented in this case is whether claims for refund of illegal collections, claimed to be income taxes but which the Congress had never imposed, must be filed within two years after the payment of the tax as provided by Section 322 (b) of the Internal Revenue Code or within four years after the payment of the tax as provided by Section 3313 of the Internal Revenue Code (R. S. 3228).

STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code, Section 322, so far as pertinent reading as follows:

"(a) (1) *Overpayment.* Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment • • • shall be refunded immediately to the taxpayer • • •

(b) (1) *Period of limitation.* Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later • • •"

Code Section 3313 (R. S. 3228):

"All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner within four years next after the payment of such tax, penalty, or sum."

Regulations 86, Art. 117-5—Set out *below* in letter from Internal Agent in Charge, dated June 11, 1937.

STATEMENT OF FACTS.

The statement in petitioner's brief is accepted with the addition following page 3 of that brief that the letter from Internal Revenue Agent in Charge to the respondent contained the following statement:

"In completing the audit of the return, it was found that you had failed to comply with the provisions of Article 117-5, Regulations 86. Article 117-5 reads as follows:

> 'In the application of Section 117, a husband and wife regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under Section 117 (d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets.'

When this provision is applied to the sales of stocks, Mrs. Noble has a net loss of $49,862.56, of which $2,000.00 is deductible, and you have a net gain of $45,049.45" (R. 17-18).

Also the further statement that on December 9, 1940, this Court in *Helvering v. Janney, et al.*, 311 U. S. 189, held that Art. 117-5, Regulations 86, quoted in the foregoing letter, was void.

PREFACE.

Petitioner's brief was not mailed to respondent's counsel until October 28, 1947, which may cause a short delay in filing this brief.

The petitioner's brief contains only the usual formal parts, a statement of what purports to be the question presented and a statement of facts. There is no argument and no citations of authorities and it is believed it does not constitute such a brief as contemplated in the rules of this Court.

The purported brief in lieu of argument refers to a brief filed in a case appearing as No. 71 on the docket, which has not been consolidated with the instant case and

is totally unlike it in all the pertinent facts involved and none of the parties are the same. A careful study of that brief discloses that it is not material to the issue in the instant case which involves no income tax.

Throughout the certiorari proceedings in the present case there has been evident the plain intent to make the fight in case No. 71, *Jones, Collector v. Liberty Glass Co.* and then undertake to attach the instant case as an appendage to that case, though there is no similarity in the facts in the two cases.

In the petition for the writ of certiorari in the instant case no reasons were assigned for invoking the jurisdiction of this Court but only a reference to a petition filed in the *Liberty Glass Co.* case.

While amounts in dispute are usually immaterial to legal points involved it may be noted that in the petition for certiorari in the *Liberty Glass Co.* case one of the reasons given for the grant of the writ was the importance of the case involving other cases, it was stated, amounting to approximately $200,000.00, which sum was "no measure of the amount of refunds that would have to be made, etc.", and yet the fight is being made on a little claim for $1,053.49 instead of being made in the instant case involving a refund of $21,105.90 because of a sum exacted by the Commissioner and collected by the petitioner without authority of law and under a Regulation which this Court declared invalid.

The Court is respectfully requested to refer to the respondent's motion to dismiss the writ of certiorari with its supporting brief in which there are pointed out the dissimilarities and contrasts between the two cases now endeavored to be yoked together.

It is believed that in the progress of this case the facts both as to treatment in the petition for the writ and in the brief and in the total dissimilarity between the two cases will warrant the dismissal of this proceeding.

SUMMARY OF ARGUMENT.

The exceptive clause in Revised Statutes 3228 embraces only the cases stated in the exception. The statutory language used in Code Section 322 may not be enlarged so as to embrace refunds of taxes not "imposed by this chapter."

The facts in this case do not bring it within the limited application of the language used in Section 322 and this has been the view of all the lower courts who have passed upon the question in similar cases where collections were made as of taxes that the Congress had not imposed as distinguished from those cases where too much of a lawfully imposed tax had been paid.

The historical development of the exceptive clause in R. S. 3228 and of Code Section 322 support this position.

This is particularly a case for the application of R. S. 3228 in that the respondent had paid all taxes for the year involved that had been imposed upon him by law and there should not have been exacted from him under an illegal and void regulation the sum of money the petitioner collected from him purporting to be a tax on his gains from sales of capital assets, disregarding his wife's losses though a joint return had been filed.

ARGUMENT.

The issue is simply stated, whether the collection in this case was a tax imposed by the income tax provisions of the revenue laws, refund of which would be governed by Code section 322 (b), or a collection, not of any tax imposed by such income tax provisions, but an illegal collection made without authority of law, refund of which is governed by Code section 3313 (R. S. 3228).

This is not an income tax case. None of the laws relative to income taxes can have application here. It might as well have been called a gift tax, a transfer tax, or any excise tax, calling it so does not make it so. Suppose the

Commissioner had called it an estate tax, would the limitation on refunds of estate taxes apply?

The revenue laws as enacted by the Congress provide for a joint return of husband and wife as a taxable unit and impose taxes on the income of such taxable unit, and it was so held by this Court in the *Janney* case (*supra*).

The respondent and his wife made such authorized joint return in which was reported their joint income as such taxable unit and paid the tax assessed on such return, and a small deficiency later determined (R. 17 (6)). Thereupon all duty of this taxable unit—including both husband and wife—as to the year 1935 ceased. All legally required return had been made. All taxes imposed by law had been paid. The amount here involved was collected on transactions that produced no income, that resulted in a loss, something never authorized by the Congress nor by the Sixteenth Amendment.

I.

The Exceptive Clause in Revised Statutes 3228.

It is well recognized that an exception in a general statute is to be strictly construed, and that courts will not curtail the general provision nor add to the exception by implication, that the language of the exception defines the extent of its force.

Further, this Court has particularly stated:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." *Gould v. Gould*, 245 U. S. 151.

This principle applies to statutes of limitations. *U. S. v. Updike*, 281 U. S. 489.

The language in the exceptive clause and the language in the thing excepted should determine the issue.

The historical development of this exceptive clause is exhaustively set out by Judge Haney in the opinion of the Circuit Court of Appeals of the Ninth Circuit in *Huntley v. Southern Oregon Sales, Inc.*, 102 F. (2nd) 538, where it was held that Code Section 322 has no application in the matter of refund of a collection made as for an income tax but where no such income tax had been imposed by law.

The withdrawal of legally imposed income taxes from limitation provisions of section 3228 of the Revised Statutes first appeared in section 1316 of the Revenue Act of 1921 amending R. S. 3228 by adding thereto the following paragraph:

> "This section except as modified by Section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917 and the Revenue Act of 1918."

The "modification" of section 3228 R. S. provided by "Section 252" of the Revenue Act of 1921 referring to excess payment of taxes imposed by the named Acts was changed in the Revenue Act of 1924 to "Section 281" because that was the section providing for limitations of refunds where there has been an overpayment of any income tax • • • "imposed by this Act" or prior Acts, and likewise in the Revenue Act of 1926 this exceptive clause referred to "Section 284" of that Revenue Act because of the change in section numbers in the income tax title of the act, and then, apparently to obviate the need for the continued change of section numbers, the wording of the exceptive clause was changed to "except as otherwise provided by law in the case of income,—war-profits, excess-profits, estate and gift taxes."

There appears to be no other significance, and it is believed none is claimed, in the changes in the wording of

this exceptive clause, the clause in meaning going back to the Revenue Act of 1921 adding to R. S. 3228 the clause "except as modified by section 252."

The Congress always qualifies and limits this exceptive clause, "except as modified by Section 252" (1921 Act), "except as provided in Section 281" (1924 Act), "except as provided in Section 284" (1926 Act), "except as otherwise provided by law in the case of income, etc., taxes" (1928 and subsequent Acts, and Code Sec. 3313).

Never even was there a general exception of all income taxes, but always qualified as above.

When the Congress wanted to except all income taxes from the operation of any statute it had no difficulty in saying so. For instance, it was desired that Code section 3312 should not apply to income, etc., taxes at all. Consequently that section reads, "except in the case of income, etc., taxes * * * all internal revenue taxes shall, etc., be assessed within four years after such taxes became due * * *".

If the Congress had meant to except not only those cases provided for by certain sections—afterwards changed to the more embracing term "law," but for all refunds of income, etc., taxes, it could so easily have said so by saying:

> "Except in the case of income, etc., taxes all claims for the * * * refunding of any internal revenue tax alleged, etc."

Just as was done in enacting Section 3312 so as to eliminate income taxes from the limitation of that section. But it didn't say that. Obviously it didn't mean that. It didn't mean to except all income taxes but only those otherwise provided for, only those imposed by law.

It is well settled that "there is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *U. S. v. American Trucking Association*, 310 U. S. 534, 543.

A study of the historical development of this exceptive clause and of the provisions for the refund of excess payments of taxes legally imposed still further indicates that the Congress meant what it said when it "undertook to give expression to its wishes."

II.

The Limited Statutory Application of Code Section 322.

This limitation so far as pertinent here originally appeared as Section 252 of the Revenue Act of 1921 providing a limitation on claims for refund of five years from the time the return was filed where it appeared "upon examination of any return of income made *pursuant to this Act*" (emphasis ours) that an amount of tax had been paid in excess of that properly due, although that five year period might exceed the general limitation in R. S. 3228.

Then arose the doubt as to whether a claim for refund of an ordinary overpayment of a lawfully imposed tax paid after the expiration of the five year period from filing a return could come within the application of R. S. 3228 providing for refunds of *illegal* collections, not of too large payment of a lawfully imposed income tax.

In this connection the petitioner, in the courts below, cited the Mellon letter and the Gregg statement as illustrating the need of amendment.

Thereupon was enacted the Act of March 4, 1923 (C. 276,42 Stat. 1504) amending this section 252 of the 1921 Act by inserting a limitation of two years after payment on refunds of excess payments of lawfully imposed taxes.

In section 281 of the 1924 Act, 284 of the 1926 Act and 322 of the 1928 and subsequent Acts the application of these sections is always limited to tax "imposed by this Act", and other named Acts, "imposed by this Title", or "imposed by this chapter" (Code Sec. 322).

Always the tax must have been imposed by law before this section would apply.

The use of the word "overpayment" in these sections providing for limitations on refunds of lawfully imposed taxes seems to be of no special significance. The material words are—"tax imposed by this chapter."

Besides in Section 4 (c) of the Current Tax Payment Act of 1943, now codified as Code Section 3770 (c) immediately preceding section 3771 relating to "interest on overpayments", it is provided:

> "(c) *Rule Where No Tax Liability.*—An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid."

This would seem to dispose of the contention made by the petitioner in the courts below that respondent's position would deny interest on overpayments and defeat the jurisdiction of the Tax Court.

III.

The Facts in This Case Do Not Bring It Within the Limited Application of Code Section 322.

There could not have been any "tax imposed by this chapter" on the respondent's gain of $45,049.45 on his sales of capital assets because where a joint return is filed there is no tax on one spouse as an individual.

There could not have been any "tax imposed by this chapter" against the taxable unit of husband and wife on capital sales, as they resulted in a loss. The Commissioner undertook to impose a tax on a loss.

The question is, whether the Commissioner imposes the claimed liability or whether the law imposes it, and under its terms Code section 322 applies only to the latter.

The collection of this money by the petitioner was his individual act. He was personally liable. He was personally sued. The United States did not collect the money

from the respondent. The petitioner's act in making the collection was unauthorized by any law, unauthorized by any official with lawful power to order the collection made. Code section 322 could not apply to the petitioner, he did not collect a "tax imposed by this chapter", a tax imposed by the United States or authorized by the United States.

IV.

The Views of Lower Courts.

The decisions of other courts in comparable cases, and the sound reasoning in the opinions in the courts discussing the question at length, and the unanimity of the conclusions reached, would seem of persuasive value.

First was the *Southern Oregon Sales, Inc.*, (*supra*) case affirming the district court in a lucid and thorough discussion of the question.

In that case the Solicitor General formally announced that no petition for certiorari would be filed (1939 Prentice-Hall Federal Tax Service, Sec. 4.35).

Since that decision in 1939 the Congress has passed nine revenue acts affecting income taxes and no change was made as to limitations on refunds of illegal collections as construed by that court.

Thus it may be implied that the court's construction of the statutes met the approval of the Congress.

In *U. S. v. Lederer Terminal Warehouse Co.*, 139 F. (2nd) 679, the Circuit Court of Appeals for the Sixth Circuit affirming the district court, cites the *Southern Oregon Sales., Inc.*, case, with approval and follows up the historical development of this exceptive clause, adding the statement:

> "The fact that in the cited case, *no tax whatever* was due from the taxpayer while in the instant case, *no additional tax was due* is deemed immaterial." (Emphasis the court's.)

However in the case at bar no tax whatever was due, the legal tax liability having been fully paid (R. 17 (6)).

In the *Lederer* case the court said:

> "Congress evidently considered that less time would be required for the discovery of errors in tax returns resultant from miscalculations or mere overpayment than would be required to ascertain the *erroneous or illegal nature of an assessment.* Hence, the inference is logical that Congress intended to allow the taxpayer a longer time to determine whether he had been erroneously or illegally assessed than would be permitted him for the discovery of a mere overpayment of taxes, *assessed and collected upon a correct or legal basis.* This would explain the longer time limitation provided by Congress in Section 3313 than allowed in Section 322 of the Internal Revenue Code." (Emphasis supplied.)

Barring the two dissimilar cases pending in this Court, this case and No. 71, so far as careful study discloses, there have been reported only two other cases involving the question as to whether the two year or the four year limitation applies where sums have been collected which the Commissioner claimed to be income taxes, to wit: *Olsen v. U. S.*, 32 Fed. Supp. 276 (D. C. S. D. California) and *Sbarbaro v. United States*, decided May 29, 1947, (U. S. D. C. N. D. Ill.) 1947 Prentice-Hall Federal Tax Service Sec. 72,485, in both of which cases the collections were held illegal and the four year limitation applied.

It would seem of persuasive value that these four courts reached the conclusion, two of them after exhaustive investigation, as well as the other two district courts in the *Southern Oregon Sales, Inc.*, case and the *Lederer* case, that collections of sums not imposed by law as income taxes are not governed by Code section 322 but by Section 3313, the lower courts in the instant case reaching the same con-

clusion. The unanimity of opinion of the seven courts, five district courts and two circuit courts of appeal passing on the question, it is believed, will receive careful consideration.

When this case was before the Circuit Court of Appeals the petitioner cited *Central Hanover Bank & Trust Co. (Arnold Estate) v. U. S.*, (67 F. Supp. 920) as deciding to the contrary, but that court did not so hold. It only mentioned that in that case the two year limitation applied, as it does to almost all claims for refunds of income taxes, but no holding was made on that point.

In that case there was no collection made under any illegal ruling of general application such as was the fact in the instant case, but the Commissioner had merely made a mistake in cost of certain securities. That was the very kind of case, being an overpayment of *tax imposed by law*, that section 322 was meant to cover. That case was decided in favor of the taxpayer under IRC Sec. 3801 (b) (5) which again illustrates the fact that the Congress has been liberal in its provisions of the time within which to file claims for refund whenever a considerable length of time was necessary in the interest of justice.

V.

Regulations 86, Art. 117-5.

The collection in this case was specifically made under Article 117-5 of Regulations 86 (Under 1934 Act), which is quoted in the letter of June 11, 1937, from the Internal Revenue Agent in Charge asserting this claim against the respondent.

In *Helvering v. Janney, et al.*, (*supra*) this Court held that regulation illegal.

It necessarily follows that the sum now sued for, having been collected under a Regulation of the Commissioner invalidated by the Supreme Court was an illegal collection and that consequently Internal Revenue Code, section 3313,

controls and the period for filing a claim for refund was four years after payment.

This Regulation had been promulgated by the Commissioner with the approval of the Secretary of the Treasury, and though illegal and void, taxpayers were forced to abide by it.

The Commissioner with the approval of the Secretary of the Treasury persisted in this ruling through *Regulations 101, Art. 117-5* applicable to the Revenue Act of 1938, and *Regulations 103, Art. 19.117-5* applicable to the Internal Revenue Code, and until the Supreme Court on December 9, 1940, in the *Jauney* case (*supra*) held that said regulation was illegal, and thereafter on July 2, 1941, the Commissioner by *Treasury Decision 5057* amended the prior Regulations so as to make them conform to the decision of the Supreme Court. Thus for approximately seven years the Commissioner with the approval of the Secretary of the Treasury persisted in making and repeating this illegal ruling so that the same appeared to have the effect of law commanding the respect of all taxpayers.

Surely the exacting of money claimed as a tax but collected under this long persisted in ruling was not such a payment as contemplated by the Committee on Ways and Means in its Report (*H. Rep. No. 1424, 67th Cong. 4th Sess.*) where it was stated that the Committee "considers one year sufficient" (or 2 years as later amended) within which to file a claim for refund.

Throughout revenue legislation there has been manifest the desire and intent of the Congress to allow a taxpayer a reasonable length of time within which to ascertain and determine his right to file a claim for refund.

For example, in the Revenue Act of 1942, section 322 of the Code was amended so as to allow seven years in which to file a claim for refund in connection with the effect that deductibility of a debt or loss has on application by the taxpayer of a carryover, thus giving the tax-

payer a reasonable time for ascertaining and determining his right to file a claim for refund.

Similarly in Public 291, 79th Con. 1st Session approved July 31, 1946, the time for claiming credit or refund with respect to war losses was extended, obviously for the reason that more time was required in which to ascertain and determine the effect of these losses.

Two years within which to file a claim for refund of a collection, enforced through an illegal ruling of the Commissioner, a ruling applicable not merely to that case but generally to all cases similarly situated, would not seem sufficient within which to obtain an adjudication that the ruling was illegal, and this limitation would be thoroughly out of harmony with the clearly and repeatedly shown intent to allow the taxpayer a reasonable time *after the occurrence* within which to determine his rights.

VI.

Statutory Authority for Refunds of Income Taxes Under R. S. 3228.

The Act of March 4, 1923, (C. 276,42 Stat. 1504) amended the Revenue Act of 1921 in the exact language reported by the Committee on Ways and Means to the 67th Congress, 4th Session (Report 1424), and by the Senate Finance Committee (S. Rep. 1137, 67th Congress 4th Session) as follows:

> "(b) Where a tax has been paid under the provisions of section 221 or 237 in excess of that properly due, any refund or credit made under the provisions of this section or section 3228 of the Revised Statutes shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent" *42 U. S. Stat. at Large 1504-5.*

This amendment covered refunds of excess payments of taxes imposed by the Revenue Act of 1921 and by all

prior Acts, but was remedial and applied only to claims thereafter filed.

Sections 221 and 237 were income taxes. Refunds could be made either under section 252, referring to overpayments of taxes imposed by Title I of that Revenue Act or under section 3228 R. S. referring to illegal collections where the amount withheld as tax had not been imposed by law. A close search of the records reveals no report and no enactment changing that intent of the Committees and of the Congress. The meaning of the language is clear and needs no interpretation. It must be that the Committees and the Congress meant what they said.

CONCLUSION.

The decision of the court below is in consonance with the congressional committee reports and with all the courts that have passed on the question, follows the law as enacted by the Congress, and should be affirmed.

Respectfully submitted,

E. M. Baynes,
West Palm Beach, Florida,
W. H. Harris,
Fort Valley, Georgia,
Julius L. Berns,
Detroit, Michigan,
Attorneys for Respondent.

J. Otto Ortwein,
Detroit, Michigan,
Of Counsel.

ADDENDUM — There is no administrative difficulty to be resolved. The Bureau has no difficulty in drawing the distinction between "legally collected taxes" and "illegally assessed and collected taxes" and provides in Mimeograph 3958 (C.B.XI-2,23) and Mimeograph 4564 (C.B. 1397-1,93) that refunds of taxes *"legally collected"* shall be treated as income for the taxable year in which the refund is made, while a different treatment is provided in the case of a refund of *"taxes illegally assessed and collected"*. Applying the same distinction, *"legally collected taxes"* come within the provisions of Code section 322 while *"illegally assessed and collected taxes"* come within the provisions of Code section 3313 (R.S. 3228). The two statutes say so.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

GILES KAVANAGH, Collector of Internal Revenue, *Petitioner*, vs. J. H. NOBLE, *Respondent.*	No. 70
H. C. JONES, Collector of Internal Revenue, *Petitioner*, vs. THE LIBERTY GLASS COMPANY, *Respondent.*	No. 71

BRIEF OF REGINALD S. LAUGHLIN, AMICUS CURIAE.

REGINALD S. LAUGHLIN,
Mills Building, San Francisco 4, California,
Amicus Curiae.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1947

GILES KAVANAGH, Collector of Internal Revenue, *Petitioner,* vs. J. H. NOBLE, *Respondent.*	No. 70
H. C. JONES, Collector of Internal Revenue, *Petitioner,* vs. THE LIBERTY GLASS COMPANY, *Respondent.*	No. 71

BRIEF OF REGINALD S. LAUGHLIN, AMICUS CURIAE.

The undersigned is attorney for the appellants in case No. 11,651 now pending in the United States Circuit Court of Appeals for the Ninth Circuit entitled *"Suzanne FitzGerald Fawcett, et al. v. United States of America"*. The case involves an application for refund of a tax imposed on a dividend declared

on stock owned by decedent within one year after the death of the decedent. Such a tax was unqualifiedly held to be unauthorized by the Estate Tax Act.

Maass v. Higgins, 312 U. S. 443, 85 L. Ed. 940.

It was also held by the Circuit Court of Appeals of the Sixth Circuit in *In re Tindle's Estate*, 59 F. Supp. 667, 152 F. (2d) 757, not to be a tax "imposed by" the Estate Tax Act within the meaning of 26 U.S.C.A., Section 910, and therefore recoverable within four years under 26 U.S.C.A., Section 3313, the Court saying:

> "The refund was rather for a refund sought to be imposed as an estate tax, but held by the Supreme Court not to have been levied at all under the statute in question."

The government did not ask for a review of that decision and it is not directly before the Court in the above-entitled cases.

We do not wish in any way to argue the question as to the nature of the taxes involved in the cases now actually before the Court, as we know they will be adequately presented by counsel, but we are filing this brief because of the possibility that the Court's decision might throw some uncertainty on the correctness of the decision in *In re Tindle's Estate*, supra, on which we relied in presenting the claim for refund within four years and in which the government did not seek a review by this Court.

We feel that the failure of Congress to amend the law so as to avoid the interpretation made in *In re*

Tindle's Estate amounts to a legislative approval thereof.

The tax was not an estate tax and was not a tax "imposed by" the estate tax statute and might as well have been called a dividend tax, an income tax, a capital stock tax, an excise tax or any other type of tax rather than an estate tax.

The Honorable District Judge in the case of *Fawcett v. United States of America* based his decision largely on the fact that this Court in *Rosenman v. United States,* 323 U. S. 658, referred to Section 910 as the statute applicable to claims for refund of taxes imposed by the estate tax statute. We have no quarrel with that statement because the question here is whether this particular exaction was so imposed. However, in that case there was no question raised as to whether that statute or the four-year statute was applicable to the particular case before the Court. As a matter of fact, in that case the claim for refund was made within three years after the tax was paid and therefore there was no question raised or involved as to which statute was applicable. The only question actually involved in the case was the erroneous claim made by the government that the tax was actually paid many years before the payment was credited on the tax, when a deposit was made on account of the tax. This contention of the government was held to be unfounded and it was held therefore that the claim for refund was timely even under the three-year statute. The Court had no occasion whatever to pass on the four-year statute and its mere reference to the

three-year statute cannot be deemed to be a decision on the question here involved. Moreover, that case involved merely an overpayment of the tax, due to the disallowance of certain deductions, and not to a totally illegal exaction, and was one therefore that was properly referred to as being governed by Section 910.

Whatever may be the rule applicable in the two cases here under review, we believe that it should be made clear that the decision in *In re Tindle's Estate* was correct, thus avoiding the necessity of another review by this Court in the case of *Fawcett v. United States of America*.

The undersigned respectfully requests permission to file this brief, copies of which have been delivered to counsel in the two cases before the Court and to counsel for the government in the case of *Fawcett v. United States of America*.

Dated, San Francisco, California,
November 7, 1947.

REGINALD S. LAUGHLIN,
Amicus Curiae.

We hereby consent to the filing of the above brief and admit service of a copy thereof.

Attorneys for Petitioner in No. 70.

Attorneys for Respondent in No. 70.

Attorney for Petitioner in No. 71.

Attorney for Respondent in No. 71.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 70.

October Term, 1947.

GILES KAVANAGH, Collector of Internal Revenue,
Petitioner,

v.

J. H. NOBLE,
Respondent.

RESPONDENT'S PETITION FOR REHEARING.

E. M. BAYNES,
W. H. HARRIS,
JULIUS L. BERNS,
Attorneys for Respondent-Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States.

October Term, 1947.

No. 70.

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE,
Petitioner,

v.

J. H. NOBLE,
Respondent.

RESPONDENT'S PETITION FOR REHEARING.

Now comes J. H. Noble, respondent, and petitions the Court for a rehearing of the above entitled case decided against him by this Court on December 22, 1947, time for filing this petition, for good cause shown and by proper order, having been extended to March 1, 1948, and on the following grounds:

I.

The opinion in this case indicates the adoption by the Court of the theory of the Attorney General that this case should follow the decision in the *Liberty Glass Company* case, No. 71, October Term, 1947, and that the suit in this case was of like nature with that in the *Liberty Glass Company* case, overlooking the fact that the two cases are totally unlike, with no point of similarity.

The strategy of the Attorney General's office has been clear. In point of time the instant case antedated the *Liberty Glass Company* case and involved about twenty times as much money.

Yet the petition for certiorari was filed in the *Liberty Glass Company* case, a weak case where reversal was to be

expected, reasons and argument adduced for the grant of the petition in that case, and then in the instant *Noble* case there was no real petition for certiorari, no reasons given for its grant, but merely a reference to the *Liberty Glass Company* case, as if that should be controlling, and as if reference to another case complied with the rules of this Court.

Again, the *Noble* case came first on the docket, being No. 70, while the *Liberty Glass Company* case was No. 71. They so appeared at first on the daily calendar in the Bar Meeting Room. Suddenly the position of these two cases on the calendar was reversed, at whose instance or by what order is unknown to the respondent's counsel, but this shift enabled the Attorney General to make the main argument in the *Liberty Glass Company* case first, apparently the object of the shift of the cases and consistent with the theory of the Attorney General that the instant case should follow the *Liberty Glass Company* case in all respects.

In the opinion in the *Liberty Glass Company* case, the Court discussed the arguments adduced by the plaintiff in that case, and merely referred to those arguments in the opinion in the instant case, evidently considering that the two cases are alike, as contended by the Attorney General.

II.

The facts in the two cases are totally unlike. In the *Liberty Glass Company* case there was merely an unintentional mistake in computing the tax, resulting in the taxpayer having paid more income tax than was owing, exactly the kind of case covered by the language of the Code Section 322.

In the instant case, there was no error in computing any income tax. No income tax is involved. This is not an income tax case. No income tax liability in any amount existed. Mr. and Mrs. Noble, constituting a taxable unit as provided by the laws of Congress, had paid the tax shown thereon (R. 16 (4)). In that return they reported together

their losses and gains from sales of capital assets which this Court, in *Helvering v. Janney et al.*, 311 U. S. 189, held was proper.

Upon the audit of this joint return, there was determined a deficiency of $421.80 which was paid on June 7, 1937 (R. 17 (6)). Thereupon, every taxwise duty owed by that taxable unit had been discharged.

These sales of capital assets by husband and wife showed considerable loss. Notwithstanding the loss to this taxable unit, the defendant in the original suit, Kavanagh, exacted from the plaintiff the sum of $21,105.90 (R. 35 (2)). This could not have been any income tax as was the case in the *Liberty Glass Company* case. Here this taxable unit was as free from any tax liability as a newborn babe. It might as well have been picked out of the sky. There was no income on which it could be imposed. The sum was extracted as a result of a loss sustained by the taxable unit, and the Congress has not yet imposed taxes on losses, and if the Congress did not impose the tax Code Section 322 by its terms is inapplicable.

Whether Kavanagh was acting under an order of the Commissioner is inmaterial. The order of a superior officer does not justify the doing of an illegal act, whether of cruelty or murder in a concentration camp, or in taking money from an humble citizen which he does not owe.

III.

The suits in the two cases are totally unlike. The instant suit was not an action on a refund claim. In this Court's opinion (page 3) it is stated: "The taxpayer then brought this suit against the Collector to recover the amount alleged to be due in the refund claim".

The suit was not brought against the Collector, but against Kavanagh as an individual. The word "Collector" was put in by the Attorney General.

In this respect there are attached as Exhibits "A" and "B", certified copies of the complaint and the judgment

in the original suit, believing that this Court will not insist upon a strict adherence to formality and to rules to the detriment of doing justice. The original certified copies of these papers will be attached to the printed original petition for rehearing to be filed herein.

The attention of the Court is called to the caption of the case showing the individual as defendant; also it was captioned "Action for Money Had and Received"; also the jurisdiction (Paragraph 3 of complaint) was based on diverse citizenship, the limitation period was stated (Par. 5) as six years from accrual of right of action, as provided by Michigan statute, no mention was made of any claim for refund and the judgment (Ex. "B") of the District Court was against Kavanagh individually and without any reference to the defendant being Collector or holding any office.

There has really been no appeal from this judgment. When the appeal was entered it was entered in behalf of Kavanagh as Collector, against whom as such no judgment had been rendered, the Attorney General seeming to have preferred that course.

IV.

It is true that respondent's counsel, rather naively perhaps, acceded to the suggestion of petitioner's counsel that a third amendment to the complaint be prepared and filed, but at no point was any portion of the original complaint abandoned or changed. This third amendment to the complaint was in line with the decision of the Circuit Court of Appeals of the Sixth Circuit in *U. S. v. Lederer Terminal Warehouse Company*, 139 F. (2d) 679, and this case was to be tried in a district court in that circuit.

The astute suggestion of this third amendment to the complaint and its incorporation in the record in the appeal by the petitioner did not raise any doubts in the minds of respondent's counsel for the reason that it was not believed possible that any other court than the Circuit Court of Appeals of the Sixth Circuit would pass on this question. It

had been the consistent policy of this Court not to grant petitions for certiorari unless there were diverse decisions of lower courts of appeal or unless some question of general importance was presented.

V.

It is most respectfully submitted that this Court has a misconception of the instant case. For example, in the opinion in the *Liberty Glass Company* case (page 7) (referred to because the Court considered that opinion applicable here), the case of *Rosenman v. U. S.*, 323 U. S. 658, 661, is cited and yet in that case there was no question presented as to which statute of limitations would apply, but only the question as to whether a deposit on account of taxes was a "Payment" that would start the limitation to run.

In the opinion in the *Liberty Glass Company* case, there was no explanation as to the difference in the language of the Congress in Code Section 3312, where all income taxes were excluded, and in Section 3313, where the exclusions were "except as modified by Section 252" (1921 Act), "except as provided in Section 281" (1924 Act), "except as provided in Section 284" (1926 Act), "except as otherwise provided by law in the case of income, etc., taxes" (1928 and subsequent Acts and Code Sec. 3313).

The Court apparently overlooked the legislative history of the exceptive clause in R. S. 3228 indicated above which shows that every time the Congress mentioned this exceptive clause it did so in limiting language and apparently went out of its way not to make a general exception of income taxes as was done in Code Section 3312. The difference of language in Code Sections 3312 and 3313 (R. S. 3228) is striking. It must mean something.

This was one of respondent's main arguments, obviously overlooked, for it is not mentioned in the opinion in either case.

The Court apparently overlooked that the courts and also the Bureau have long drawn the distinction between

legally imposed taxes and illegal collections as for taxes but where the taxes had not been imposed by law, as witness Mimeograph 3958 (C. B. X-1-2, 23) and Mimeograph 4564 (C. B. 1937-1, 93), another of respondent's unnoticed arguments.

In the opinion in the *Liberty Glass Company* case there is a discussion of the meaning of the word "Overpayment". Certainly that discussion could have no relation to the instant case, respondent having stated in his brief (p. 10), "The use of the word 'overpayment' in these sections providing for limitations on refunds of lawfully imposed taxes seems to be of no special significance. The material words are '*tax imposed by this chapter.*'". (Emphasis supplied.)

The word "overpayment" seems no different from "excess payment" or "payment of too much"—none of which can relate to a collection made from one who was due to pay no tax nor make any return.

No point made on behalf of the respondent in brief or argument seems to have been considered, but all of them ignored under the mistaken theory that the *Liberty Glass Company* case would control this case.

It is most respectfully submitted that the humblest citizen taxpayer is as much entitled to have his rights considered and determined as is the powerful office of the Attorney General.

The language of Code Section 322 cannot be stretched so as to cover a collection of anything else except a tax *imposed by law. The statute says so.* The language would seem to admit of no misinterpretation.

Suppose the respondent had called the exaction a transfer tax, a gift tax, or an estate tax. Calling it such could have no effect and so calling it an income tax could not make it come within any of the provisions of law applicable to income taxes. It was neither gift tax nor income tax, but as much the one as the other.

Respondent's position is that in fact no statute of limitations applies to this exacting of money by one with-

out authority to make the exaction but only the limitation provided by the laws of Michigan, or in any event that as this could not possibly have been an income tax, nor any tax of any kind, then Code Section 3313 covering illegal collections would be applicable.

VI.

The Court apparently has overlooked that Code Section 3313 (R. S. 3228) related to other collections than taxes and for that reason applies here. It provides for "any sum alleged to have been . . . in any manner wrongfully collected." It would be difficult to frame language better describing this wrongful collection not of a tax but of a "sum" exacted without authority of any law imposing taxes.

VII.

A most disturbing point in this decision is that the Court seems to follow the administrative interpretation of Sections 322 and 3313 in preference to the interpretation placed upon the two statutes by the courts below during the period of the last eight years, though courts are in better position to make impartial interpretations. It seems not far wrong to say that the interpretations of laws pertaining to the collection of internal revenue made by the Treasury Department are largely based on the earnest desire of the Treasury Department to collect taxes and to keep them. It is recognized that it is the duty of the Treasury Department to collect taxes, first, last and always and its interpretations are usually in favor of the Government rather than the taxpayer. For example, the Treasury Department for many years insisted, issuing a special Regulation to that effect, that on a joint return of husband and wife, the sales of capital assets should be reported separately. This Court refused to follow that administrative interpretation in *Helvering v. Janney, et al.*, 311 U. S. 189, and yet in the instant case which arose from the invalidated

Treasury decision in that case, it is proposed to follow the administrative interpretation of Section 322 and make it not merely applicable to actual taxes "imposed by this chapter", as the statute plainly says, but to make it applicable to any collection which the Commissioner *calls* an income tax.

If a citizen received a gift of $10,000.00, receiving nothing else during the year, and the Commissioner imposed a tax on that amount and *called* it an income tax, then under the interpretation of the Treasury Department, which this Court now proposes to follow, that collection would not be an erroneous and illegal collection covered by Code Section 3313 but would come within the coverage of Code Section 322, though directly in the teeth of the language of the statute, "imposed by this chapter."

In the matter of curbing administrative interpretations, one of the objectives of the Administrative Procedure Act, there is a timely article by Honorable John W. Gwynne of the House Committee on the Judiciary, in the January issue of the American Bar Journal.

It is respectfully submitted that when the Court follows the recognized rule that taxing statutes, especially statutes of limitation, are to be strictly construed and the language of the statute not enlarged by Treasury interpretations, then it must be held that an illegal collection, not of an income tax based upon any known income tax law but based on an invalidated interpretation by the Commissioner and the Secretary of Treasury and enforced by an illegal act of an inferior officer, would be an *illegal collection* and therefore come within the purview of Section 3313.

It was an administrative interpretation made by the Treasury Department and invalidated by this Court that caused this loss to this taxpayer. His money was taken from him illegally and the return of it has been refused although the Congress gave him four years within which to file his claim for money illegally collected but not imposed by any taxing statute.

The arguments of the Court cited here are those in the *Liberty Glass Company* case because that is the case this Court has followed in deciding the instant case, though the two diametrically opposed cases were so different in their facts as to give the Court an opportunity to draw the distinction between illegal collections not warranted by any law on the one hand and excess collections of taxes imposed by law on the other.

VIII.

It is respectfully suggested to the Court that there are several ways in which this petition may be passed upon, which dispositions are requested in the alternative, to wit:

1. The petition could be granted and a rehearing had on the record as it stands, and this case *heard on its merits,* to which it is believed the respondent is entitled, and not as an appendage to another case.

2. The Court could order the entire pleadings in the original suit in the District Court sent up so that full consideration may be given to this case, and that is requested unless the writ is dismissed.

3. The Court could dismiss the writ of certiorari for the reason that the petition does not show, as required by Rule 38, Paragraph 2, "the reasons relied on for the allowance of the writ."

The last named disposition is consistent with many holdings of this Court that if upon full consideration of the case it appears that the writ was improvidently granted it would be dismissed. *Layne and Bowler Corp. v. Western Well Works,* 261 U. S. 387, 393; *Furness, Withy & Co. v. Yang-Tsze Insurance Association,* 242 U. S. 430; *U. S. v. Rimer,* 220 U. S. 547.

Not only is it believed the writ should be dismissed because the petition for the same is really no petition in this case, but also the question as made by the facts in this case is not of general importance. Prior to these two

cases there have been, throughout more than thirty years of income tax litigation, only four cases presenting the question as to whether Section 322 or 3313 would apply. That disposition would work no injustice to anyone. Money wrongfully taken from one would merely be returned to its owner, if Kavanagh is able to make restitution.

Respectfully submitted,

E. M. Baynes,
West Palm Beach, Florida,
W. H. Harris,
Fort Valley, Georgia,
Julius L. Berns,
Detroit, Michigan,
Attorneys for Respondent-Petitioner Here.

Certificate of Counsel.

I hereby certify that I am of counsel for the respondent in the above stated case presenting this petition for rehearing, and the same in my opinion is well grounded in law and in fact, and is presented in good faith and not for delay.

W. H. Harris.

At West Palm Beach, Florida
This February 23, 1948.

EXHIBIT "A."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 3855

Action for Money Had and Received

J. H. NOBLE,
Plaintiff,

v.

GILES KAVANAGH,
Defendant.

Now comes J. H. Noble, plaintiff herein, and sues Giles Kavanagh, defendant, upon the following cause of action, towit:

1.

Plaintiff is a citizen of the United States residing in the County of Palm Beach, State of Florida.

2.

Defendant is a citizen of the United States, a resident of Wayne County, Michigan, and is within the jurisdiction of the District Court of the United States for the Southern Division of the Eastern District of Michigan.

3.

This suit is within the jurisdiction of said court by reason of the diverse citizenship of the parties.

4.

The amount in controversy is in excess of $3,000.00, being for the principal sum of $21,527.70.

5.

Plaintiff's cause of action accrued July 14, 1937, and this action is brought within the limitation period provided by the Michigan statute, towit, within six years after the right of action accrued.

6.

On July 14, 1937, and at all times hereinafter complained of, defendant was a collector of internal revenue for the United States of America for the district of Michigan.

7.

Plaintiff duly and timely made and filed with said collector of internal revenue his federal income tax return for the year 1935, the same being a joint return of himself and wife, and the tax was duly paid.

8.

In said joint return the losses from sales of stocks incurred by his wife exceeded plaintiff's gains from the same source by more than $2,000.00, and said amount of $2,000.00 was consequently deducted as loss.

9.

On June 7, 1937, in conference with the office of the Internal Revenue Agent in Charge in Detroit, Michigan, the return was accepted with some minor adjustments resulting in a tax deficiency of $421.80, which plaintiff paid by giving his check for that amount and interest at the time, and an agreement that such was the tax liability was signed at that conference.

10.

Thereupon, plaintiff had discharged his full tax duty as to 1935, having made proper return and having paid in full his tax liability as agreed upon at the conference, which was correct, and was under no obligation to make any further or other return for 1935, or to pay any income tax for that year.

11.

Thereafter, on July 14, 1937, while plaintiff was under no obligation to make any return or pay any tax for 1935, and while no officer or agent of the United States had any authority of law over plaintiff as to his 1935 tax liability, which had been fully discharged, the said Giles Kavanagh, defendant herein, insisted that plaintiff in his said joint income tax return had no right to offset any of plaintiff's wife's losses from sales of securities against plaintiff's gains from the same source, and alleging that as his reason insisted, and under threat of distraint upon plaintiff's property demanded, that plaintiff pay over to him the said defendant, the sum of $21,527.70, contrary to the laws of Michigan and of the United States.

12.

Whereupon, the said defendant, individually, but under the guise of his office as collector of internal revenue, though having no such authority, and no duty to perform as Collector so far as plaintiff was concerned, and under threat of distraint, illegally and wrongfully and without authority of law, forced this plaintiff to pay to him, the said Giles Kavanagh, the said sum of $21,527.70, though plaintiff did not owe the same, but which amount plaintiff under protest, and rather than have his property subjected to the threatened distraint by one acting illegally under the pretended authority of an officer of the United States, paid to the said Giles Kavanagh on July 14, 1937, in Wayne County, Michigan.

13.

The said sum of money, though thus under compulsion paid over to the said defendant, was by him wrongfully and illegally obtained, had and received, and the same remained and remains the money of this plaintiff, and the said defendant continues to hold the same without any authority therefor, and contrary to plaintiff's rights.

14.

The amount so exacted and forcibly obtained by defendant from plaintiff was not a tax, nor was it an overpayment of any tax, there being at that time no liability of plaintiff to make any return or pay any tax, and no assessment having been made against plaintiff for any tax subsequent to plaintiff's payment on June 7, 1937, of his tax in full.

15.

Plaintiff has demanded of the defendant the return of the said sum of $21,527.70, but the defendant fails and refuses to return to or pay over to plaintiff said monies or any part thereof.

WHEREFORE, plaintiff prays personal judgment against the defendant for the said principal sum of $21,527.70, together with interest thereon at the rate of five (5%) per cent per annum from July 14, 1937, until paid, together with costs of this proceeding.

EUGENE M. BAYNES
W. H. HARRIS
Counsel for Plaintiff

Verification.

STATE OF GEORGIA
COUNTY OF PEACH

Personally appeared W. H. Harris, who being duly sworn herein on oath says that he is one of the attorneys for the plaintiff named in the foregoing declaration, and authorized to make this affidavit, and that the statements therein contained, so far as based on his own knowledge are true, and so far as based on records and information received from others, he believes them to be true.

W. H. HARRIS

Sworn to and subscribed before me this July 8, 1943.

Delma M. Hutto
Notary Public, Georgia
State at Large

(Seal)

U. S. District Court
Eastern District of Mich. } ss.

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

George M. Read, Clerk
By ANNA K. HAAG
Deputy Clerk

Dated:
December 29, 1947

EXHIBIT "B."

UNITED STATES OF AMERICA

IN THE DISTRICT COURT OF THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 3855

SUMMARY JUDGMENT FOR PLAINTIFF

J. H. NOBLE,
Plaintiff,
v.
GILES KAVANAGH,
Defendant.

At a session of said court held in the Federal Building, Detroit, Michigan, this 14th day of May, A. D. 1946.

Present HON. ARTHUR F. LEDERLE, District Judge.

In accordance with findings of fact and conclusions of law filed simultaneously herewith,

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment, as amended, be, and the same is hereby granted, and that the plaintiff, J. H. Noble, recover of the defendant, Giles Kavanagh, the sum of $32,266.29.

IT IS FURTHER ORDERED that defendant's motion for summary judgment of dismissal, as amended, be, and the same is hereby overruled.

ARTHUR F. LEDERLE
District Judge

U. S. District Court
Eastern District of Mich. } ss.

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

George M. Read, Clerk
By Anna K. Haag
Deputy Clerk

Dated
Dec. 29, 1947

SUPREME COURT OF THE UNITED STATES

No. 70.—October Term, 1947.

Giles Kavanagh, Collector of Internal Revenue, Petitioner, *v.* J. H. Noble.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 22, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

This case is a companion to *Jones* v. *Liberty Glass Co.*, *ante*, p. —.

The stipulated facts show that on March 1, 1936, the respondent taxpayer filed with the Collector of Internal Revenue a joint individual income tax return for himself and his wife for the calendar year 1935. This disclosed a tax liability of $8,017.01, which was duly paid. In the return the losses and gains from sales of capital assets by the taxpayer and his wife were reported together, the losses of the wife being deducted from the gains of the husband, resulting in a net loss in excess of $2,000. This amount (the allowable limit of loss) was deducted on the return.

On June 7, 1937, the taxpayer was advised at a conference with revenue agents that there was additional income tax due for the year 1935, aggregating $421.80. The taxpayer's check, which was tendered for that amount, was later returned to him. Then by a letter dated June 11, 1937, a revenue agent notified the taxpayer that instead of a deficiency of $421.80 on the 1935 income tax return there was a deficiency of $19,973.93 and the taxpayer was furnished a computation showing the basis for such determination. The agent relied upon

Article 117–5, Regulations 86, later declared void by this Court in *Helvering* v. *Janney*, 311 U. S. 189. After protest and further conference, the taxpayer gave the agent a check for $21,527.70, covering the then proposed deficiency assessment of $19,973.93, plus interest of $1,553.77. This check was remitted to the United States Treasury, after having been received by the Collector on July 21, 1937.

On July 14, 1937, the taxpayer and his wife executed an agreement waiving certain statutory restrictions in their favor and consenting to the immediate assessment and collection against them of 1935 income tax in the principal sum of $19,973.93, plus deficiency interest of $1,553.77, which the Commissioner thereafter assessed. The agreement specified in a footnote that it was not a final closing agreement under § 606 of the Revenue Act of 1928 and that it did not therefore preclude the assertion of a further deficiency if one should be determined, nor did it extend the statutory period of limitation for refund, assessment or collection of the tax.

On January 28, 1941, the taxpayer and his wife filed a claim for refund of $21,105.90, plus interest, on the ground that there had been an illegal assessment and collection since the revenue agents had "refused to allow the losses of one spouse against the gains of the other spouse in the joint return of husband and wife." Reference was made to § 3313 of the Internal Revenue Code, specifying a four-year period of limitations. The Commissioner of Internal Revenue rejected this claim in reliance upon § 322 (b) (1) of the Revenue Act of 1934 (the same as § 322 (b) (1) of the Code), establishing a two-year period of limitations; it was pointed out that § 3313 specifically excludes income taxes from those for which a claim may be filed within four years after payment.

On July 12, 1941, the taxpayer filed his individual claim for refund of $21,527.70 paid with respect to the

year 1935. The claim was on the same grounds as the claim previously filed by the taxpayer and his wife. This claim was returned with the request that the wife join in the execution of the claim; this request was refused and the claim was returned to the Collector; once again the claim was returned to the taxpayer.

The taxpayer then brought this suit against the Collector to recover the amount alleged to be due in the refund claim. The District Court held that the decision of the Sixth Circuit Court of Appeals in *United States* v. *Lederer Terminal W. Co.*, 139 F. 2d 679, controlled the case and made it clear that the four-year period of § 3313 was applicable. Summary judgment was therefore entered for the taxpayer. 66 F. Supp. 258. The Sixth Circuit Court of Appeals affirmed *per curiam*, 160 F. 2d 104, citing its previous decision in the *Lederer Terminal* case.

For reasons which we have set forth in *Jones* v. *Liberty Glass Co.*, *ante*, p. —, the decision below cannot stand. The two-year period provided by § 322 (b) (1), rather than the four-year period of § 3313, governs income tax refund claims. The overpayment which brings § 322 (b) (1) into operation occurs whenever the taxpayer has paid an amount over and above his true liability. Hence, if we assume that the deficiency assessment and collection in this case were without legal authority, the taxpayer's payment of that illegal assessment was an overpayment within the meaning of § 322 (b) (1). And he had two years from the date of that payment within which to file a claim for refund. Since he did not file his claim until three and a half years after payment, the claim was out of time.

It may well be that the taxpayer's refund claim was prompted by this Court's decision in *Helvering* v. *Janney*, *supra*, which set aside the Treasury regulation upon which the deficiency assessment was based. That decision was

rendered on December 9, 1940, and the taxpayer filed his first refund claim on January 28, 1941. But assuming that the *Janney* decision makes clear that the taxpayer here made an overpayment, the loss which he now suffers from an application of § 322 (b) (1) is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. *Rosenman* v. *United States*, 323 U. S. 658, 661. Remedies for resulting inequities are to be provided by Congress, not the courts.

Moreover, it is not our province to speculate as to why Congress established a shorter period of limitations relative to the income tax than is the case of those taxes governed by § 3313. It is enough that § 322 (b) (1) creates a two-year period applicable to all income tax refund claims and that the claim in this case is of that type.

Reversed.

MR. JUSTICE DOUGLAS dissents.